Supreme Court of the United States

OCTOBER TERM, 1940.

No. 255.

LOUIS E. RODDEWIG, as Chairman of the Iowa State Board of Assessment and Review, and Individually; D. L. MURROW and C. FRANK GREEN, as Members of the Iowa State Board of Assessment and Review, and Individually,

Petitioners,

vs.

SEARS, ROEBUCK AND CO.

No. 256.

LOUIS E. RODDEWIG, as Chairman of the Iowa State Board of Assessment and Review, and Individually; D. L. MURROW and C. FRANK GREEN, as Members of the Iowa State Board of Assessment and Review, and Individually,

Petitioners,

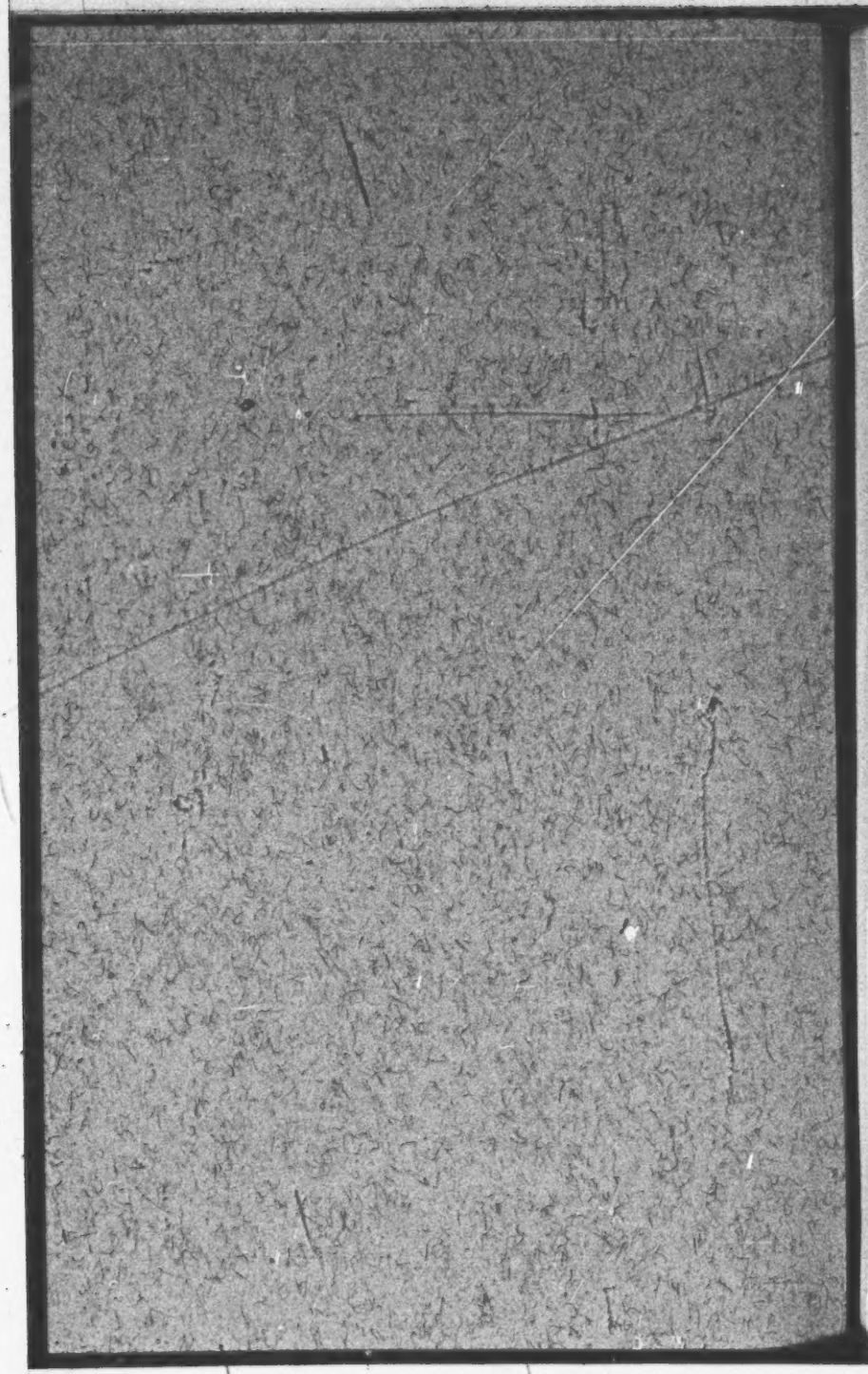
vs.

MONTGOMERY WARD AND CO., INCORPORATED.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA.

BRIEF FOR PETITIONER.

JOHN M. RANKIN,
Attorney General of the State of Iowa,
JOHN E. MULRONEY,
Assistant Attorney General,
Counsel for Petitioners.



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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA.

BRIEF FOR PETITIONER.

PRELIMINARY STATEMENT.

This case and the companion case of Louis E. Roddewig, et al. v. Montgomery Ward & Company, No. 256 of this Court involve identical questions of law. Since our argument here is confined to the mail order transactions, the

cases involve identical questions of fact. The two cases were not consolidated for trial in the District Court of Polk County, Iowa but that Court rendered identical opinions and decrees and the cases were orally argued together in the Supreme Court of Iowa. It will be noted the opinion in the Supreme Court of Iowa in the Sears, Roebuck case is the controlling opinion and the two cases were the subject of one Petition for Writs of Certiorari in this Court. Because of this, we are filing identical briefs in this case and the Montgomery Ward case, Nos. 255 and 256 in this Court. Separate records have been filed and we will continue our plan of record references which was adopted in our Petition for Writs of Certiorari, namely, designating record references in the Sears, Roebuck case as "R. S." and record references in the Montgomery Ward case as "R. M."

OPINIONS OF THE COURT BELOW.

The opinion of the Iowa Supreme Court in the Sears, Roebuck case (No. 255 in this Court) is the controlling opinion and it is reported in 292 N. W. 130 and is found in the record R. S. 88.

The opinion of the Iowa Supreme Court in the Montgomery Ward case (No. 256 in this Court) is reported in 292 N. W. 142 and is found in the record R. M. 101.

STATEMENT AS TO JURISDICTION.

This case comes here under a writ of certiorari granted ~~September~~ 14, 1940 by this Court to review the final judgment of the Supreme Court of the State of Iowa, the highest Court of that State, holding that the collection and payment provisions of the Iowa Use Tax Law as applied to the respondent's mail order business amounted to extraterritorial operation of the Iowa laws within the prohibition of the Fourteenth Amendment to the Constitution of the United

States, and also holding that such provision of the Iowa Use Tax Law, when applied to the respondent's mail order business, imposed an unconstitutional burden upon interstate commerce. The extraterritorial operation of the statute was discussed at length in the opinion of the Supreme Court of the State of Iowa while but slight reference is made to the holding of the trial Court that the provisions of the Iowa Use Tax Law constitute a burden on interstate commerce. (See Iowa Supreme Court opinion, 292 130). This brings the case within the provisions of the Judicial Code, Section 237(b), as amended, 28 U. S. Code Ann., Section 344(b).

STATEMENT OF THE CASE.

The respondent is a non-resident corporation licensed to do business in the State of Iowa. Pursuant to such license it has established and is now conducting various retail stores in Iowa. In addition to the business conducted in Iowa, this corporation conducts a mail order business through mail order stores or establishments located outside of Iowa. From time to time mail order catalogs are sent to prospective customers in Iowa and the Iowa customers send orders by mail to such mail order stores located outside of Iowa and the orders are there filled and the merchandise shipped to the purchasers in Iowa.

The Iowa Use Tax Act (Appendix B) provides that every retailer maintaining a place of business in the State and making sales of tangible personal property for use in the State shall at the time of the making of the sale, whether within or without the State, collect 2% use tax from the purchaser. Other provisions of the Act provide that the tax shall constitute a debt owed by the retailer to the State and further that whenever the retailer maintaining a place of business in the State is a corporation authorized to do business in Iowa and fails to comply with the provisions of

the Iowa Use Tax Act, then the retailer's license and the permit authorizing the corporation to do business in the State of Iowa may be revoked.

The respondent, hereafter called the corporation, has not collected or paid a use tax on such mail order sales to the Iowa residents. The State Tax Commission adopted a resolution threatening to revoke the corporation's retailers license and permit to do business in Iowa for failure to collect and pay the use tax on mail order sales of tangible personal property to the residents of Iowa.

The corporation sought an injunction restraining the Commission from taking any action to secure the revocation of its retailers license or permit to do business in Iowa. The Polk County Iowa District Court granted the injunction holding the Iowa Use Tax Law, insofar as it purports to authorize the Commission to insist upon the corporation collecting the tax on mail order sales made to persons in Iowa through mail order establishments located outside of Iowa, is unconstitutional, being contrary to Section 8 Article I of the Constitution of the United States and Section 1 of the Fourteenth Amendment thereto.

Upon appeal to the Supreme Court of Iowa the decisions of the lower Court were affirmed (the Chief Justice and three other Justices dissenting) upon the same ground, viz.; the Iowa Use Tax Law, insofar as it purports to compel the corporation to collect the 2% tax from Iowa purchasers in mail order transactions under penalty of revocation of the corporation's retailers license and permit to do business in Iowa, is in violation of Section 8 of Article I of the United States Constitution, an i Section 1 of the Fourteenth Amendment thereto.

SPECIFICATION OF ERRORS TO BE URGED.

It is submitted that the Supreme Court of Iowa erred in holding:

(a) That the collection and payment provisions of the Iowa Use Tax Law as applied to the corporation's mail order business amounted to extraterritorial operation of the Iowa laws within the prohibition of the 14th Amendment to the Constitution of the United States;

(b) That the collection and payment provisions of the Iowa Use Tax Laws as applied to the corporation's mail order business imposed a tax upon its activities outside of the State within the prohibition of the 14th Amendment to the Constitution of the United States;

(c) That the collection and payment provisions of the Iowa Use Tax Law as applied to the corporation's mail order business imposed an unconstitutional burden on interstate commerce;

(d) In regarding itself as compelled by Section 8 Article I of the Constitution of the United States and Section 1 of the 14th Amendment thereto to affirm the ruling of the Polk County District Court restraining the Commission from taking steps to cancel the permit and retail license of the corporation for failure to collect or pay the tax on mail order sales to Iowa residents.

SUMMARY OF ARGUMENT.

POINT I.

The Iowa Use Tax and the Iowa Sales Tax must be construed together to determine the constitutional validity.

Authorities on law:

Henneford v. Silas-Mason Co., 300 U. S. 577 (1937).

Gregg Dyeing Company v. Querry, 286 U. S. 472.

Southern Pacific Co. v. Andrew J. Gallagher, 306 U. S. 167 (1939).

POINT II.

The collection and payment provisions of the Iowa Use Tax Act as applied to the company's mail order business do not amount to extraterritorial operation of the Iowa law within the prohibition of the Fourteenth Amendment to the Constitution of the United States.

(a) The requirement that the retailer act as agent of the State in collecting the tax from its customers is not an attempt on the part of the State to enforce its laws extraterritorially.

Authorities on law:

Henneford v. Silas Mason Company, 300 U. S. 577.

Monamotor Oil Co. v. Johnson, 292 U. S. 86.

Felt & Tarrant Mfg. Co. v. Gallagher, 306 U. S. 62 (1939).

(b) The Use Tax is conditioned upon an event occurring within the State of Iowa, namely, Use, and it is immaterial if the order was the result of personal solicitation, or the approval of the order an extrastate activity.

McGoldrick v. Berwind White Coal Mining Co., 309 U. S. 33 (1940).

Jagels, "a fuel corporation" v. Taylor, 60 S. Ct. 469.

McGoldrick v. A. H. DuGrenier, Inc., 309 U. S. 70 (1940).

McGoldrick v. Felt & Tarrant Co., 309 U. S. 70 (1940).

(c) The power to impose the duty of collecting the tax upon the seller in consideration of the grant of privilege to the seller to engage in the retail business in Iowa is not prohibited by the due process clause of the constitution.

Authorities on law:

Ford Motor Co. v. Beauchamp, 308 U. S. 331.

Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U. S. 412.

Pierce Oil Company v. Hopkins, 264 U. S. 137.

Equitable Assurance Society v. Pennsylvania, 288 U. S. 143.

General De Tabocos v. Collector of Revenue, 275 U. S. 98.

(d) If intrastate activity in connection with the sale for use in Iowa be thought necessary, then such activity is present in this case.

Authorities on law:

Sears, Roebuck v. Roddewig, 292 N. W. 130 (Dissenting opinion of Justice Hamilton).

POINT III.

The collection and payment provisions of the Iowa Use Tax Law as applied to the corporation's mail order business imposed no unconstitutional burden on interstate commerce.

Authorities on law:

McCarroll v. Dixie Greyhound Lines, 60 S. Ct. 504.

Felt & Tarrant Mfg. Co. v. Gallagher, 306 U. S. 62.

McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33 (1940).

McGoldrick v. Felt & Tarrant Mfg. Co., 309 U. S. 70 (1940).

McGoldrick v. A. H. DuGrenier, Inc., 309 U. S. 70 (1940).

Jagels, "a fuel corporation" v. Taylor, 60 S. Ct. 469.

Wiloil Corporation v. Pennsylvania, 294 U. S. 169.

Monamotor Oil Co. v. Johnson, 292 U. S. 86.

Western Live Stock v. Bureau of Revenue, 303 U. S. 250.

Board of Equalization v. Blind Bull Co., 101 Pac. (2nd) 70, decided April 16, 1940 (Wyoming).

Hollis and Co. v. McCarroll, 140 S. W. (2nd) 420 (Ark.) May 6, 1940.

United Autographic Register Co. v. McGoldrick, 21 N. Y. Sup. 129, (New York S. C. Appellate Div. June 28, 1940).

POINT I.

The Iowa Use Tax and the Iowa Sales Tax must be construed together to determine the constitutional validity.

In considering the Iowa Use Tax Act we must of necessity call to the Court's attention the Iowa Sales Tax Act. The Iowa Sales Tax Act was first enacted into law in 1935. It was re-enacted by the 47th General Assembly of Iowa in 1937. (Appendix A). As will be observed from an examination of the Sales Tax Act, a tax of 2% is measured upon the gross receipts from all sales of tangible personal property sold at retail in the State to consumers or users. At the time the retail sales tax act was re-enacted in 1937, the same 47th General Assembly passed the Use Tax Act, which is Chapter 198 of the Acts of the 47th General Assembly. (Appendix B). It will be observed that this Use Tax Act provides for an imposition of an excise tax on the use in the State of Iowa of tangible personal property measured by 2% of the purchase price of said property. "Use" is defined by the Act as the exercise by any person of any right or power over tangible personal property incident to ownership of that property. The Use Tax Act applies only to the use of tangible personal property brought into the State of Iowa, the gross receipts from the sale of which were not subject to the Iowa Sales Tax Act or the sales or Use Tax Act of any other State. Together these

two Acts form a single complete plan of taxation and impose a uniform tax measured by 2% of the purchase price upon all goods used in the State of Iowa with the exceptions noted in the Acts.

For the purpose of preventing evasion and to assist in the proper administration of the Act, evidence that tangible personal property was sold and delivered in this State is *prima facie* evidence that such personal property was sold for use in this State, and any one making sales of tangible personal property for use in this State not exempted under the provisions of the Act, is required to collect the tax imposed by the Use Tax Act from the purchaser. The Sales Tax Act contains similar provisions requiring the seller to collect the 2% sales tax from the purchaser.

This plan of taxation is identical with the plan employed by the State of Washington in connection with its sales tax and compensating tax. In the case of *Henneford v. Silas-Mason Co.*, 300 U. S. 577, (1937) the Washington Compensating Tax Act was attacked. The United States Supreme Court took into consideration the complementary features of the Act and approved the system employed.

In the case of *Gregg Dyeing Company v. Querry*, 286 U. S. 472, the South Carolina statute imposing a tax on the storage for use of gasoline was under attack. Another statute imposed a tax upon gasoline sold in South Carolina and in answer to the argument that the first statute must be considered by itself, this Court stated:

> "The state court answered the contention as to discrimination against interstate commerce by referring to other statutes of the State imposing a tax upon the sale and use of gasoline within the State. The State Court said that the Act in question 'taxes all gasoline stored for use and consumption upon which a like tax has not been paid under other statutes. By the kindred Acts all users are taxed.' But appellants question the right to invoke other statutes to support the validity of the

> Act assailed. To stand the test of constitutionality, they say, the Act must be constitutional 'within its four corners,' that is, considered by itself. This argument is without merit. The question of constitutional validity is not to be determined by artificial standards. What is required is that state action, whether through one agency or another, or through one enactment or more than one, shall be consistent with the restrictions of the Federal Constitution. There is no demand in that Constitution that the State shall put its requirements in any one statute. It may distribute them as it sees fit, if the result, taken in its totality, is within the State's constitutional power."

The Iowa plan of taxation is also similar to the California plan of sales and use tax. In the case of *Southern Pacific Co. v. Andrew J. Gallagher*, 306 U. S. 167 (1939) this Court in considering a use tax question stated:

> "The Use Tax Act is complemental to the California Retail Sales Tax Act of 1933. The latter levies a tax upon the gross receipts of California retailers from sales of tangible personal property; the former imposes an excise on the consumer at the same rate for the storage, use or other consumption in the state of such property when purchased from any retailer. As property covered by the sales tax is exempt under the use tax, all tangible personalty sold or utilized in California is taxed once for the support of the state government."

Taking the sales tax and use tax together, and we submit they can be taken together for the purpose of consideration of the issues involved in this case, the two statutes present a plan for taxing all retail purchases of tangible personal property. The purpose of the use tax, to prevent the liklihood of a drain upon the revenues of the State where the sales tax is in force by placing orders outside the State, is readily apparent. The experience in Iowa after two years of a sales tax without a use tax prompted the Legislature, when re-enacting the Sales Tax Act to pass this complementary Use Tax Act. The sales tax without a use tax en-

couraged local buyers to place orders with sellers outside the State. The result sought to be obtained is quite apparent. By the passage of the Use Tax Act the local retailers are protected so that they can compete upon terms of equality with retailers of other states. We believe these two Acts must necessarily be considered together and this legislative purpose taken into consideration in determining the validity of this Act.

POINT II.

The collection and payment provisions of the Iowa Use Tax Act as applied to the company's mail order business do not amount to extraterritorial operation of the Iowa law within the prohibition of the Fourteenth Amendment to the Constitution of the United States.

(a) The requirement that the retailer act as agent of the State in collecting the tax from its customers is not an attempt on the part of the State to enforce its laws extraterritorially.

Perhaps the best argument in support of our position that the State of Iowa is not seeking to assert jurisdiction in regard to the Company's activities in another State and thereby give its law extraterritorial effect, is contained in the dissenting opinion of Chief Justice Hamilton in the case of *Sears, Roebuck & Co. v. Roddewig*, 202 N. W. 130, 137 to 140, and the dissenting opinion of Justice Mitchell in the same case at page 137.

Of course it will not be contended here that this use tax is unconstitutional. That such a use tax is a valid exercise of the taxing power of a State has long been upheld. In fact, in the case of *Henneford v. Silas Mason Company*, 300 U. S. 577, the Court in upholding the Washington Compensating Tax, which is similiar to our use tax, stated that

the right to so tax was no longer in the "arena of debate."

The controversy here centers around Section 8 of the Act where provision is made that every retailer maintaining a place of business in this State and making sales of tangible personal property for use in this State, whether such sales are made within or without the State, shall collect from the purchaser the tax imposed by this Act.

Precisely what is the nature of the duty thus cast upon the retailer? *It is simply this, that the retailer is designated and made the agent of the State of Iowa for the purpose of collecting from the source, to wit, the purchaser, the tax which the purchaser owes to the State of Iowa.* This is neither a new, strange, nor unusual duty; and the imposition of such a duty has met with the fullest approval of this Court. In the case of *Monamotor Oil Co. v. Johnson*, 292 U. S. 86, Justice Roberts, in upholding the collection provisions of the Iowa Gasoline Tax Act, stated:

> "The appellant, however, says that the state officials have required it to report and to pay tax on shipments made from Oklahoma direct to dealers in Iowa who are appellant's customers, and that in respect of such transactions the burden on interstate commerce is obvious. But if the gasoline so imported is intended to be used in Iowa for motor vehicle fuel it is subject to the tax. If it is not so used by the appellant's customer, or by the purchaser at retail, either may obtain a refund of the tax collected by the appellant and remitted to the state. The statute obviously was not intended to reach transactions in interstate commerce, but to tax the use of motor fuel after it had come to rest in Iowa, and the requirement that the appellant as the shipper into Iowa shall, as agent of the state, report and pay the tax on the gasoline thus coming into the state for use by others on whom the tax falls imposes no unconstitutional burden either upon interstate commerce or upon the appellant."

We understand this argument of extraterritoriality arises in the prohibition contained in the Due Process Clause of

the Fourteenth Amendment to the Constitution which denies to the State the power to tax or regulate the corporation's property and activities elsewhere. In the *Monamotor Oil Company* case this same argument was advanced, for the appellant in that case complained that the State officials required it to report and to pay tax on shipments made direct from Oklahoma to dealers in Iowa. The Court stated:

> "The method of imposition and collection of the tax does not deny the equal protection of the laws guaranteed by the Fourteenth Amendment. * * * The short answer to the contention is that the statutes properly construed lay no tax whatever upon distributors but make of them mere collectors from users of motor vehicle fuel and refund the tax only to that class of users upon whom no excise is intended to be laid. The distributor does not pay the tax; the user does."

This same argument of extraterritorial operation of a State law was also advanced in the case of *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U. S. 62 (1939). This is the case which Chief Justice Hamilton in his dissenting opinion discussed at length. In this case the Felt & Tarrant Company, an Illinois Corporation, sought to enjoin the State Tax Collector of California from collecting a tax similiar to our use tax where the sales of comptometers were made by the Felt & Tarrant Company by means of orders solicited by agents in the State of California. The orders were all subject to acceptance by the Illinois corporation at its home office in Chicago. The comptometers which the company sold were sometimes shipped direct to the purchasers, but sometimes the orders were filled from stocks of stored comptometers in the State of California. Counsel in that case did not question the right of the State to collect the use tax from the user, but as in this mail order case, counsel questioned the right of the State to compel the seller to serve as an agent for collecting the tax. The argument was made that

this would be a direct burden upon interstate commerce and also that:

> "Numerous provisions of the statute if applied would deprive appellant of its property without due process of law."

Thus the issue of extraterritoriality was present in that case, and this Court merely held:

> "The trial court thought that both contentions were foreclosed by what was said and ruled in *Bowman v. Continental Oil Co.*, 256 U. S. 642, 650, 41 St. Ct. 606, 609, 65 L. Ed. 1139 (1145), *Monamotor Oil Co. v. Johnson*, 292 U. S. 86, 93, 95, 54 S. Ct. 575, 578, 78 L. Ed. 1141 (1147, 1148), and *Henneford v. Silas Mason Co.*, 300 U. S. 577, 582, 583, 57 S. Ct. 524, 526, 527, 81 L. Ed. 814 (818, 819). And we agree with that conclusion."

Counsel has argued that these two decisions, namely, the *Monamotor Oil Company* case and the *Felt & Tarrant v. Gallagher* case were based on the sole ground that there was in each case no violation of the commerce clause of the Constitution; that the argument of extraterritorial operation of the State laws was not presented or passed upon in either case. As we read these cases we find the decisions do give consideration to both the commerce clause and the due process clause of the Fourteenth Amendment. We think the exact contention of extraterritoriality was made in each case and decided against the sellers. So, too, did Justice Hamilton in his comments upon these cases in his dissenting opinion in the Sears, Roebuck case reported in 292 N. W. 130. In speaking of the *Felt & Tarrant* case in connection with counsel's argument that the extraterritoriality issue was not involved, Justice Hamilton at page 138 stated:

> "Appellee attempts to differentiate between the *Felt & Tarrant Mfg. Co.* case and the instant case and further contends that the issue of extraterritoriality involved in the instant case was not raised, argued or de-

cided in the California case. We disagree with counsel for appellee. Mr. Justice McReynolds, who has never been accused of being unable to clearly express himself, states the issues as follows: 'Appellant seeks an injunction prohibiting the state officers from enforcing against it the California Use Tax Act of 1935. Cal. Stat. 1935, ch. 361, p. 1297, as amended by Cal. Stat. 1937, chs. 401, 671 and 683, pp. 1327, 1874, 1936. Counsel do not question the right of the state to collect this tax from the user, etc., but they say that, in the circumstances here disclosed, the officers may not compel appellant *to serve as an agent for collecting the tax* as they are threatening to do.' (Italics ours.) This is exactly the contention which appellee, in the instant case, is now making."

Then follows a quotation from the *Felt & Tarrant* case, a part of which we have already made, and the additional comment:

"The foregoing, in substance, is the argument now made to this Court in the instant case."

Again in this same dissenting opinion on page 140 Justice Hamilton discussed this issue of extraterritoriality under the due process clause and with reference to the *Monamotor Oil Company* case stated:

"The same contention was made in the case of *Monamotor Oil Co. v. Johnson, supra,* and in disposing of this feature, Justice Roberts speaking for the Court, said:"

Then follows a quotation from the *Monamotor Oil Company* case which we have already made.

Of course counsel realizes that these two cases must be distinguished or the argument of extraterritoriality is foreclosed. The cases cannot be distinguished upon the facts so counsel is left with the argument that the lawyers in this case failed to raise this issue and consequently this Court did not pass on this phase of the case. In the light of the clear unequivocal statements in each case, we submit the is-

sue of extraterritoriality was raised and decided in these two decisions involving the California use tax and the Iowa gasoline tax.

(b) The Use Tax is conditioned upon an event occurring within the State of Iowa, namely, Use, and it is immaterial if the order was the result of personal solicitation or the approval of the order an extrastate activity.

Whenever argument has been made in this case, opposing counsel have always sought to distinguish such cases as the *Monamotor Oil Company* case and the *Felt & Tarrant Company* case by pointing out that in those cases the order placed by the customer was the result of personal solicitation or by pointing out, as in the case of *McGoldrick v. Berwind White Coal Mining Co.*, 309 U. S. 33 (1940), that the sale contract was completed in the State where the purchaser lived. Such arguments ignore the fundamental object of the Iowa Use Tax Act. The incident of the tax is the use of the property in the State of Iowa. From a practical standpoint, the place of making the agreement is unimportant and the use tax should be sustained regardless of the locale chosen by the parties at which to make this agreement of sale. It would seem that it should not make any difference whether the agreement of sale was made within or without the customer's State. In no case has this Court upheld such a tax on the ground that the sale contract was either solicited or consummated within the borders of the purchaser's State.

In the *Monamotor Oil Company* case the Court upheld the Iowa gasoline tax with its provisions for collection by the seller in the situations where the gasoline was shipped on a direct sale to the Iowa consignee from Oklahoma. The opinion does not state who solicited the order for the gasoline, but clearly it was a sale contract completed outside the State of Iowa.

As Chief Justice Hamilton pointed out in his dissenting opinion in the Sears, Roebuck case, the *Felt & Tarrant* case also involved a sale completed when the order was accepted in Illinois even though that order was the result of solicitation by a Felt & Tarrant Company salesman in California.

In the case of *Jagels, "a fuel corporation" v. Taylor*, 60 S. Ct. 469, affirming the decision of the New York Court of Appeals, 280 N. Y. 766, 21 N. E. (2nd) 526, this Court affirmed the judgment which had been returned by the New York Court of Appeals. An examination of the opinion in the New York Court of Appeals discloses that certain sales of coal made by Jagels, a Delaware Corporation, had been subjected to the New York City sales tax. It appeared that this company had a sales office in New York City, but no coal yard in that City. The company also had coal yards in the State of New Jersey. The sales concerning which the controversy arose fell within three classes.

The first involved orders received by telephone at the New York office and delivery to the customer in New York from a New Jersey yard; the second involved orders telephoned directly to New Jersey by the customer followed by a confirmatory written order and by delivery from a New Jersey yard to the customer in New York; the third involved written orders sent by the customer in New York to the New Jersey office followed by delivery from a New Jersey yard to the customer in New York. In all three classes the customer was billed from the New Jersey office and payment was made to that office.

Clearly in this *Jagels* case this Court, by affirming the decision of the New York Court of Appeals, upheld a tax similar in character to the Iowa use tax when applied to a mail order transaction. The third sale which was the subject of controversy in the *Jagels* case was a pure mail order transaction where the order was not apparently the result of personal solicitation by salesmen of the Jagels

Company and where the order was mailed to the out-of-state firm and there approved and delivery was made from the coal yard located outside the State and payment was made to the out-of-state seller at its location out of the State. In passing upon and affirming this *Jagels* case, this Court stated the judgment was affirmed and cited the cases of *McGoldrick v. Berwind White Coal Mining Co.*, 309 U. S. 33 (1940); *McGoldrick v. A. H. DuGrenier, Inc.*, 309 U. S. 70 (1940); *McGoldrick v. Felt & Tarrant Co.*, 309 U. S. 70 (1940). An examination of the first case of *McGoldrick v. Berwind White Coal Mining Company* shows quite clearly that the Court there upheld the New York City sales tax on the ground that delivery to the purchaser took place in the City of New York and not upon any ground that the contract of sale was also entered into in the State of New York. In this case the seller maintained sales offices within New York City at which orders for coal were received. The coal was then mined in Pennsylvania, shipped and delivered in the seller's barges to the purchaser at water's edge in New York City. This Court upheld the New York City sales tax imposing upon the vendor the duty to collect and pay the tax to the City of New York. It is true that in this case the receipt of the order, its acceptance, and the delivery of the thing sold, all occurred within the taxing jurisdiction, but the Court did not base its decision upon the ground that the contract was made in the City of New York. In the majority opinion the Court, in describing the tax stated:

> "It is conditioned upon events occurring within the State, either transfer of title or possession of the purchased property or an agreement within the State, 'consummated' there, for the transfer of title, or possession."

In the dissenting opinion the Court seemed to be of the opinion that the tax was a tax on delivery for the Court stated:

"It is urged that there is a taxable event within the State. That event is said to be the delivery of the coal."

"If because of the delivery in New York that State can tax the gross receipts from the sale * * *."

It seems quite clear that the Court in the *Berwind-White* case placed the incidence of tax upon the delivery in New York City and felt the place where the order was solicited or approved was immaterial. Both the majority and the dissenting opinion ignore the place where the order was solicited or approved.

Under the companion cases decided the same day it is made abundantly clear that this Court did not base the decision in the *Berwind-White* case on the ground that the sales contract for coal was entered into in New York on the ground that the order was solicited or secured through the New York sales office. That was not true in the *Jagels* case in the third manner of sale and there the tax was upheld on the authority of the *Berwind-White* case. Nor could the Court have upheld the tax on the ground that the transportation and delivery were through the seller's facilities, as in the *Jagels* case, for that was not true in the *DuGrenier* case where the machines were shipped by common carrier from Massachusetts direct to the New York City purchaser with the latter paying the freight.

Under the New York City Sales Tax Law a sale in New York was the incidence taxed and a "sale" was by the Act defined to mean:

"any transfer of title or possession or both * * * in any manner or by any means whatsoever for a consideration or any agreement therefor * * *."

Under the Act, transfer of possession was alone sufficient to sustain the tax. The transfer of possession in New York was the only incident common to all of the four cases decided January 29, 1940 by this Court. It mattered

not that the order for the sale was solicited by local salesmen or the contract of sale entered into in New York. It mattered not if delivery was made through the facilities of a common carrier with the purchaser paying the freight or in the seller's own trucks starting from a point outside New York. The taxable incident, namely, the transfer of possession occurred in New York and this transfer was made by one who was within the New York jurisdiction. These cases hold that under such a law that seller within the jurisdiction of New York could be compelled to collect the tax from the purchaser and pay it to the City.

Passing now to the Iowa Use Tax Law we find the incidence of the Iowa tax is use in the State of Iowa and "use" is defined to mean:

> "The exercise by any person of any right or power over tangible personal property incident to the ownership of that property. * * *"

Quite clearly the incidence of the tax must necessarily take place within the State of Iowa. The measure of the tax is the purchase price, but surely it can be said here, upon the authority of the New York City tax cases, that the manner of the solicitation of the order for sale is immaterial; the place where the order is accepted by the seller is immaterial; the manner of the delivery by the seller to the purchaser is immaterial.

Like the New York cases where the transfer of possession in New York was the only activity taxable so, too, under the Iowa law the use or exercise of ownership in Iowa is the only activity taxable. It is sufficient if this activity occurs within the borders of the State. If it does, then the seller within the jurisdiction of the State must accept the burden, placed on all other sellers to consumers in Iowa, to collect the tax for the State of Iowa.

Chief Justice Hamilton in his dissenting opinion in the *Sears, Roebuck* case, 292 N. W. 140 stated:

> "The Iowa use tax is not laid upon property outside state boundaries nor upon the sale of property made outside the state nor can it be said that the tax is upon any privilege exercised and enjoyed by appellee in other states. Contra, the tax is laid on the privilege of use within the state, and the incidental burden of collecting the tax is upon the privilege granted by the state to appellee—a privilege actually made use of—to engage in the retail business within the state. The place of making the sale has no connection with the duty of collecting the tax. The same duty applied to all retailers within the state no matter where the sale is made. The state in effect constitutes the retailer its agent for the purpose of collecting from the source, to wit, the purchaser, the tax which admittedly the purchaser-user owes the state. The state says to each retailer: 'In consideration of the right or privilege of engaging in the retail business in Iowa, you must aid the state in its administration of the law by performing this incidental duty of collecting the tax at the time of making the sale.'"

Under the Sales Tax Act, Section 11 (Appendix A) Code Section 6943.084, provision is made that all retailers must obtain a permit to do a retail business in the State of Iowa. Every retailer in Iowa must collect the sales tax, and it matters not whether the sale is an over-the-counter transaction or the result of a written sales contract. It is sufficient under the Sales Tax Act if there is a "transfer, exchange, or barter, * * * in any manner * * *" achieved. Clearly under the sales and use tax laws we need look no further than the intrastate activities which are the incidence of the tax. Once these are present, namely, use in Iowa or sale in Iowa, then the events in the transactions leading up to the incidence are all immaterial.

(c) The power to impose the duty of collecting the tax upon the seller in consideration of the grant of privilege to the seller to engage in the retail business in Iowa is not prohibited by the due process clause of the constitution.

In the dissenting opinion of Justice Mitchell in the case of *Sears, Roebuck & Company v. Roddewig*, 292 N. W. 130 at page 137 the argument is advanced that this duty to collect the tax as a prerequisite to engaging in business in Iowa is similar to the privilege or license tax upheld in the *Ford Motor Co. v. Beauchamp*, 308 U. S. 331. This is an entirely sound argument. There is no question but that the State of Iowa could tax the privilege of carrying on a retail business in the State of Iowa. The State of Iowa could also burden that privilege of carrying on a retail business within this State by imposing on those who carry on that business the duty to collect a tax from the purchasers. This was clearly illustrated in the case of *Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U. S. 412. In that case the State of Louisiana imposed a chain store tax graduated upon the basis of the number of stores included under the same general management, or ownership, whether operated in the State or not. The Great Atlantic & Pacific Tea Company, as complainant, and some 113 interveners, attacked the validity of the Louisiana chain store tax, bitterly assailing it as being violative of the 14th Amendment. They contended that the tax was upon operations outside of the State; that therefore, the statute imposing the tax denied to them the equal protection of the laws and they claimed that the right of Louisiana to exclude foreign corporations could not be used as a basis for taxing the complainant upon property that by established principles the State has no power to tax.

In the opinion the contention of the complainant and the interveners was rejected. At page 424 of the reported opinion the Court said:

"The appellants contend the Act deprives them of property without due process of law because the tax is imposed, at least in part, upon things which are beyond the jurisdiction of Louisiana. The state may not tax real property or tangible personal property lying outside her borders, nor may she lay an excise or privilege tax upon the exercise or enjoyment of a right or privilege in another state derived from the laws of that state and therein exercised and enjoyed. But as we have seen, the subject of the tax in question is the prosecution of a defined business activity within the State of Louisiana,—the conduct of a retail store which is a part of a chain under a single management, ownership or control,—a legitimate subject of a license or occupation tax. The measure of the exaction is the number of units of the chain within the state,—a measure, sanctioned by our decisions. The rate of tax for each such unit is fixed by reference to the size of the entire chain. In legal contemplation the state does not lay a tax upon property lying beyond her borders nor does she tax any privilege exercised and enjoyed by the taxpayer in other states."

Just as in the foregoing case the Supreme Court held that the State was not taxing property lying beyond her borders or taxing privileges enjoyed by the taxpayer in other states, so in the case at bar the State of Iowa is not imposing duties on the plaintiff by virtue of any activities or privileges enjoyed by the plaintiff in other states. Rather the State is imposing a duty upon the plaintiff to act as its agent in collecting certain taxes due it from citizens of the State of Iowa by virtue of privileges exercised and enjoyed by the plaintiff within the State of Iowa, to wit, the privilege of engaging in the retail business within the State of Iowa. There is no question as to the validity of the tax imposed upon the purchaser. It necessarily follows that there can be no question as to the right of the State of Iowa under its sovereign power to require the plaintiff, in this case a quasi-citizen of the State, to assist it in col-

lecting the tax due it by Iowa citizens on such sales as the plaintiff has made.

This argument was also recognized in the dissenting opinion of Justice Hamilton in the case of *Sears, Roebuck v. Roddewig*, 292 N. W. 130 at pages 140 and 141 where quotation is also made from the case of *Pierce Oil Company v. Hopkins*, 264 U. S. 137.

In the case of *Equitable Assurance Society v. Pennsylvania*, 288 U. S. 143 a Pennsylvania statute levying an annual tax of 2% upon the gross premiums received by the insurance company was upheld. The Company had paid the taxes on premiums paid to the Company outside the State by residents of Pennsylvania and thereafter sought refund. The very ground of extraterritoriality was urged by counsel and the opinion states:

> "The grounds for the only argument open are that a state cannot tax property beyond its jurisdiction. * * *; that it cannot effect that result indirectly by making the payment a condition of the right to do local business * * * and that as it could not prohibit the contracts it cannot impose the tax."

The Court held:

> "We are dealing with a corporation that has subjected itself to the jurisdiction of the state; there is no question that the state has a right to tax it, and the only doubt is whether it may take this item into account in fixing the figure of the tax. * * *
>
> "The tax is a tax upon a privilege actually used. The only question concerns the mode of measuring the tax * * * It is not unnatural to take the policyholders residing in the state as a measure without going into nicer, if not impracticable, details. Taxation has to be determined by general principles, and it seems to us impossible to say that the rule adopted in Pennsylvania goes beyond what the Constitution allows."

In *General De Tabocos v. Collector of Revenue*, 275 U. S. 98, we find the Supreme Court upholding the Government of the Philippine Islands in the latter's imposition of a tax based upon premiums paid to the plaintiff company. The facts and holding upon this point appear in the following quotation:

> "We come now to the question of the tax upon the premiums paid to the London Company, which was licensed and presumably was doing business in the Philippine Islands. Does the fact that while the Tobacco Company and the London Company were within the jurisdiction of the Philippines they made a contract outside of the Philippines for the insurance of merchandise in the Philippines, prevent the imposition upon the assured of a tax of 1 per cent upon the money paid by it as a premium to the London Company? We may properly assume that this tax placed upon the assured must ultimately be paid by the insurer, and treating its real incidence as such, the question arises whether making and carrying out the policy does not involve an exercise or use of the right of the London Company to do business in the Philippine Islands under its license, because their policy covers fire risks on property within the Philippine Islands which may require adjustment and the activities of agents in the Philippine Islands with respect to settlement of losses arising thereunder. This we think must be answered affirmatively under *Equitable Life Assurance Society v. Pennsylvania*, 283 U. S. 143, 59 L. Ed. 1239, 35 S. Ct. Rep. 829."

Surely the reasoning applied in the foregoing cases can be applied here with equal force. As the Court in the *Equitable Life Assurance Company* case stated, it is a "privilege" tax on the right to do business that is involved. And the right to measure that tax by the number of out-of-state transactions with citizens of the taxing state is upheld in each case. We submit the facts of our case do not go as far as these cases. We only ask the collection of the tax from our own citizens upon out-of-state transactions

very similar to the ones involved in the insurance cases. We ask that this be done in order to gain or hold a right to do business in this State. If the foreign corporation can be taxed by a tax that is measured by these out-of-state transactions, then surely the duty to collect a tax from others can be enforced.

The above two cases illustrate our argument under this subdivision. This burden of collecting the tax, even if it be called a tax to be paid by the seller is not a tax upon the sale as such, but if it be called a tax, it is a license tax measured it is true by the number and amounts of sales, but it does not lose its character of a license tax or regulation imposed upon the seller in return for the privilege of doing business in the State of Iowa. Such a license regulation or tax has always been held to be within the orbit of the State's taxing power.

(d) If intrastate activity in connection with the sale for use in Iowa be thought necessary, then such activity is present in this case.

In the previous subdivisions of this point we have sought to demonstrate that the tax at bar is indistinguishable upon the facts from the California use tax and the New York City sales tax recently sustained by this Court, as well as the Iowa gasoline tax sustained in the *Monamotor Oil Company* case. If we are correct in that contention then there is no need for further discussion.

If it be thought that the tax involved in this case is distinguishable, then it must be on the ground that there was in most of the cases an intrastate activity leading up to the sale. Such an activity was present in all of the cases except the *Jagels* case and possibly the *Monamotor Oil Company* case. We have argued that this could be no distinguishing feature, but in any event in these mail order sales there is a good deal of intrastate activity by the mail order house.

These activities are enumerated by Chief Justice Hamilton in his dissenting opinion in the *Sears, Roebuck* case, 292 N. W. 130 at page 139 where he stated:

> "Counsel is also wrong in saying there is no intrastate activity on the part of appellee in connection with the mail order business. The intrastate activities, in connection with mail order sales, consist first in the activity of the retailer, appellee, soliciting business from Iowa residents by means of distribution of large and small catalogues and special sales bulletins; by this means appellee displays its merchandise, its prices and gives its sales talk to Iowa customers; by this means it made, in 1937, 1,200,000 sales to Iowa residents. The activity of the purchaser within the State of Iowa consisted of making out the order, enclosing the purchase price, the carrying charge (and the requisite tax, if the law was obeyed), and placing the order in the mail and, after receipt of the goods, making use of them. The fact that the appellee, in distributing its catalogues, makes use of the express company or the United States mail instead of using its own motor trucks and making a house-to-house personal delivery of the catalogues does not make its conduct in this respect any less an activity within the state. Other activities within the State of Iowa, which obviously may be necessary, are —making adjustments in case of damaged, soiled, misfit or defective merchandise, or in the exchange of the merchandise, for any reason, which might require, in the adjustment, return of a portion of the purchase price paid; as to its credit or installment business, or might even require court action to repossess the property."

The activity of soliciting sales cannot be a question of degree. We only argue that there is evidence of solicitation for orders on the part of the mail order house. This is the only conceivable distinguishing characteristic between the mail order sale and the sale in the *Felt & Tarrant* case. That this activity of soliciting of orders by the catalog method is effective is amply demonstrated by the volume of mail order business done. There are, of course, other

obvious activities that would likely attend any business of selling, such as adjustments, credit inquiries and collection procedure.

POINT III.

The collection and payment provisions of the Iowa Use Tax Law as applied to the corporation's mail order business imposed no unconstitutional burden on interstate commerce.

The majority opinion of the Supreme Court of Iowa did not discuss the interstate commerce feature at length. The decision seems to be based upon the extraterritorial argument. But there are some references to the interstate commerce issue and since the trial Court in a written opinion (R. S. 62—R. M. 63) had held the law violative of the commerce clause and since the Supreme Court of Iowa stated the trial Court was correct in holding the law unconstitutional, we have felt it necessary to give brief consideration to this issue. Moreover, the last case cited by Justice Miller in the majority opinion on page 136 of the opinion in 292 N. W., is the case of *McCarroll v. Dixie Greyhound Lines*, 60 S. Ct., 504. This case only involved a question of the constitutionality of an Arkansas statute under the commerce clause.

It may be that counsel will not even urge that the law, as applied to the mail order business violates the commerce clause. Such an argument was advanced in the argument in the State Supreme Court, and it is only out of an abundance of caution that we present any argument of constitutional validity on that ground. Indeed as we analyze the decisions of the Supreme Court of the United States we can well understand why the Supreme Court of Iowa did not place the decision upon the ground that the statute imposed an unconstitutional burden on interstate commerce.

The interstate commerce clause does not prohibit state taxes, but it merely places in Congress the right to regulate interstate commerce. A state tax is not invalid under this clause of the Constitution unless it so far affects the commerce as to amount to a regulation that impairs the authority of Congress.

Direct attempts to regulate, except when justified under the police power or by the consent of Congress, have always been outlawed, but here we are dealing not with a regulatory statute but with a taxing statute. Taxing statutes, the effect of which is to place undue burdens upon the introduction of goods of other states, or which in any manner interfere with the free flow of interstate commerce, have likewise been condemned under the commerce clause. But on the other hand, taxing statutes which do not subject interstate commerce to a greater burden, or to the danger of a greater burden, than would result if interstate commerce were not involved, have invariably been upheld. The function of the commerce clause is to maintain equality between interstate and intrastate commerce. It does not entitle the interstate merchants to an advantage over local competitors, nor does it permit them to carry on their business without paying any part of the expense of the local governments that protect the various phases of their activities.

Whether or not a state taxing statute interferes with interstate commerce is a question of fact. An examination of the Iowa Use Tax Act clearly shows that no burden upon interstate commerce can result. The State of Iowa has in effect said to all persons who buy property in the State or who buy property for use in this State, "you shall pay a tax of 2% of the purchase price of such property." The purchaser pays the same tax whether the property which he purchases was stored in Iowa or in some other state; in both cases the tax is the same; in both cases the incidence of the tax is

on a person whose only part in the transaction was to order, pay for, and obtain possession of the property in the State of Iowa from a seller who offered the property for sale.

How can such a tax constitute interference with interstate commerce? The interstate merchant is being subjected to the same duty to collect the tax that his competitor, the intrastate merchant, must perform. The purchaser from the interstate merchant is being subjected to the same tax of 2% of the purchase price that the purchaser from the intrastate merchant must pay.

On the other hand, if the tax is held void, the effect upon intrastate commerce immediately becomes apparent. No local merchant will make any sales at all if similar goods are offered by his competitors from other states; every purchaser will pass him by to seek the vendor whose goods are free from tax. If exemption from this tax constitutes a subsidy to interstate commerce at the expense of local commerce, it follows that its imposition resulting inevitably in complete equality cannot be a burden upon interstate commerce. We do not believe it necessary to consider the constitutional validity of this tax under the commerce clause as an original proposition. The Iowa use tax is indistinguishable upon the facts from the many cases recently sustained by this Court. We have cited a number of authorities under this point in the summary of this brief and we feel it would unduly extend this brief to make a factual analysis of all of these cases. We will only discuss the case of *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U. S. 62 and call the Court's attention to the recent cases upholding the New York City sales tax in interstate transactions.

It will be recalled in the *Felt & Tarrant Mfg. Co.* case involving the application of the California Use Tax Law upon the sales of comptometers by the Illinois corporation in the State of California the contention was made

"The treatment of the appellant as a retailer subject to the provisions of the California Use Tax Act is a direct burden upon interstate commerce prohibited by the Federal Constitution."

There the Use Tax Act, as here, was complementary to the Sales Tax Act. The burden was upon the seller to collect the tax from the California purchasers. The only distinction that can be made upon the facts in the two cases is that in the *Felt & Tarrant* case soliciting agents secured the order which was later accepted in Illinois, while, presumably, in the mail order case the order is not the result of any personal solicitation by agents. We have disposed of this distinction in our argument under the extraterritorial point, but in any event it would make no difference insofar as the Act results in a burden upon interstate commerce. In both cases the transaction is clearly an interstate transaction and we feel the same result should follow, namely, that no burden upon interstate commerce results when that commerce is merely subjected to the same burden borne by intrastate commerce.

To the same effect are the cases of *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33 (1940); *McGoldrick v. Felt & Tarrant Mfg. Co.*, 309 U. S. 70 (1940); *McGoldrick v. A. H. DuGrenier, Inc.*, 309 U. S. 70 (1940); *Jagels, "a fuel corporation" v. Taylor*, 60 S. Ct. 489, all upholding the New York City Sales Tax upon interstate activities.

Since the *Berwind-White* case is the controlling decision in the last four cases cited, the following quotation illustrates this Court's conclusion that such taxes do not place an unconstitutional burden upon interstate commerce. In the opinion reported in 309 U. S. at page 59 the Court stated:

"Here the tax is conditioned upon a local activity, delivery of goods within the state upon their purchase for consumption. It is an activity which apart from its effect on the commerce, is subject to the state taxing

power. The effect of the tax, even though measured by the sales price, as has been shown, neither discriminates against nor obstructs interstate commerce more than numerous other state taxes which have repeatedly been sustained as involving no prohibited regulation of interstate commerce."

Our Iowa Use Tax Law is a nondiscriminatory exaction by the State of Iowa when it is made to apply to all purchasers for use in the State of Iowa. This we submit upon reason and upon the authorities cited above is no economic barrier and no burden upon interstate commerce. The commerce clause was intended to prevent burdensome state restrictions on interstate trade, not to destroy local trade by granting exemptions and immunities with respect to goods simply because they were acquired in interstate commerce.

CONCLUSION.

The decision of the Iowa Supreme Court in the Sears, Roebuck case was met with some dismay by the legal writers of this Country. The Editor of the Interstate Sales Tax Service of Commerce Clearing House, Inc. on page 435 in paragraph 2-410 has the following comment to make in his discussion of this decision:

"This decision (Sears, Roebuck & Co.) although it involves solely mail order business, is difficult to understand and for the time being, at least, apparently stands in a class by itself, as it will be noted that the plaintiff on the appeal was a foreign corporation qualified in Iowa and carried on an extensive intrastate business through numerous retail stores maintained in the state. The soundness of this decision, which it may be anticipated will be carried to the Supreme Court of the United States, is debatable, in that it is difficult to reconcile same with the controlling decision of the Supreme Court of the United States in *Felt & Tarrant Mfg. Co. v. Gallagher et al.* ('39), 306 U. S. 62, 59 Sup.

Ct. 376, in which it was held that enforcement of collection of the California "use" tax through the medium of a foreign corporation seller, which, although it maintained an office in the state, transacted no intrastate business therein but maintained its office exclusively for the purpose of facilitating interstate commerce business, was not violative of the interstate commerce clause of the United States Constitution. The difficulty of reconciling the Iowa case with the Felt & Tarrant decision is rather convincingly pointed out and emphasized in the dissenting opinion."

Practical, social and economic consideration require that this tax be sustained. To interpret the Iowa Use Tax Law so as to give the mail order houses a 2% subsidy over local merchants is repugnant to every principle of equality between citizens and states which it was the purpose of the Constitution to establish and protect. No burden is placed on interstate commerce by the refusal to grant a 2% subsidy over intrastate commerce. No extraterritorial activity is taxed or regulated by a nondiscriminatory collection burden placed on the right to engage in the retail business within this State.

We respectfully submit that the collection and payment provisions of the Iowa Use Tax Law as applied to the corporation's mail order business constitute a valid and constitutional exercise of the taxing power of the State of Iowa.

Respectfully submitted,

JOHN M. RANKIN, Attorney General of Iowa,
JOHN E. MULRONEY, Assistant Attorney General,
Counsel for Petitioners.

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CHARLES ELMORE CROPLI...

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 255.

LOUIS E. RODDEWIG, as Chairman of the Iowa State Board of Assessment and Review, and Individually; D. L. Murrow and C. Frank Green, as Members of the Iowa State Board of Assessment and Review, and Individually,
Petitioners,

vs.

SEARS, ROEBUCK AND CO.

No. 256.

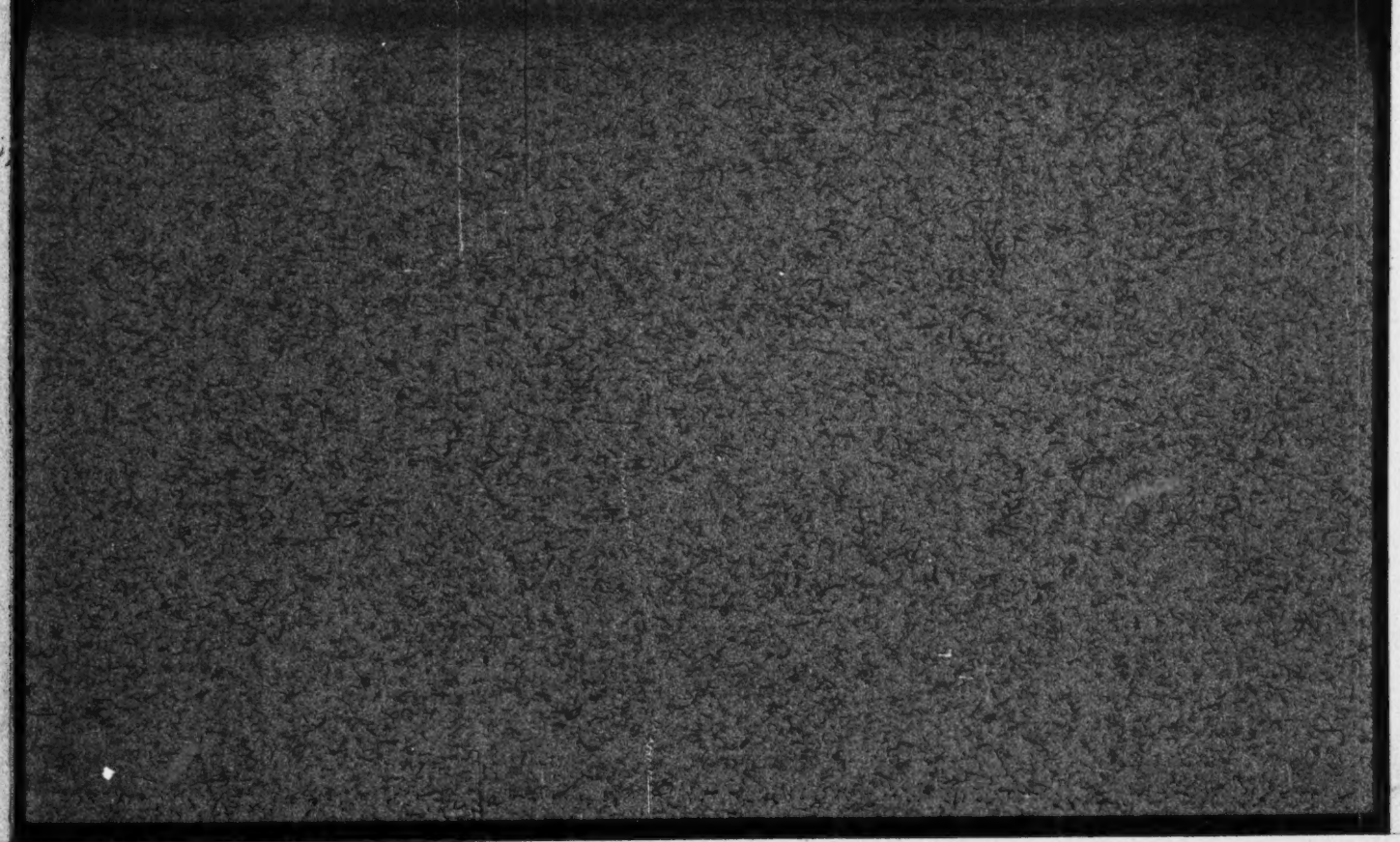
LOUIS E. RODDEWIG, as Chairman of the Iowa State Board of Assessment and Review, and Individually; D. L. Murrow and C. Frank Green, as Members of the Iowa State Board of Assessment and Review, and Individually,
Petitioners,

vs.

MONTGOMERY WARD AND CO., INCORPORATED.

RESISTANCE OF SEARS, ROEBUCK AND CO., RESPONDENT IN NO. 255, TO PETITION FOR WRIT OF CERTIORARI.

CHARLES LEDERER,
Chicago, Illinois,
JOSEPH G. GAMBLE,
RALPH L. READ,
Des Moines, Iowa,
Attorneys for Sears, Roebuck and Co.



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Section 6943.112 ... 5, 6, 17
Section 6943.122 ... 5
United States Supreme Court Rule
Rule 38, Par. 5, Subdivision a ... 6, 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 255.

LOUIS E. RODDEWIG, as Chairman of the Iowa State Board of Assessment and Review, and Individually; D. L. Murrow and C. Frank Green, as Members of the Iowa State Board of Assessment and Review, and Individually,
Petitioners,

vs.

SEARS, ROEBUCK AND CO.

No. 256.

LOUIS E. RODDEWIG, as Chairman of the Iowa State Board of Assessment and Review, and Individually; D. L. Murrow and C. Frank Green, as Members of the Iowa State Board of Assessment and Review, and Individually,
Petitioners,

vs.

MONTGOMERY WARD AND CO., INCORPORATED.

RESISTANCE OF SEARS, ROEBUCK AND CO., RESPONDENT IN NO. 255, TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

The question presented by this case is whether the action of the petitioners in threatening the revocation of respondent's permit to do business in the State of Iowa as a foreign corporation and the cancelation of the retail merchant's licenses issued to respondent for each of its retail stores because respondent has not collected or paid the taxes imposed by the so-called Iowa Use Tax Act on sales consummated entirely by mail from its mail order houses located without the State of Iowa, the goods involved in such sales being shipped by mail or other common carrier transportation facility as designated by the purchaser, constitutes a violation of the rights of respondent under Section 1 of the Fourteenth Amendment to the Constitution of the United States and Section 8 of Article I of the United States Constitution.

THE FACTS.

The following uncontradicted facts are shown by the opinion of the Iowa Supreme Court which is referred to and by reference incorporated in the petition for writ of certiorari (Petition for Writ of Certiorari, page 4).

"At the trial, it was stipulated that the plaintiff, in the conducting of its business, made sales of tangible personal property to residents or persons within the State of Iowa, by three methods, referred to as types. Type I involves sales made in its retail stores located in Iowa, which sales are subject to the Iowa sales tax. Type II involves special order sales wherein the purchaser orders from one of plaintiff's retail stores in Iowa tangible property not carried in stock by the store, but carried by one of the mail order establishments located outside of Iowa; the order is given to the local store with the purchase price, which includes trans-

portation charges; the store orders the shipment to be made direct to the purchaser from a mail order establishment, where the order is filled charging the local store with the cost price, plus overhead and transportation charges; the purchase price paid to and received by the local store is retained by it and included in the volume of its gross sales. Type III involves mail order sales. A person or resident of Iowa prepares his order, or has it prepared for him, sends it to one of plaintiff's mail order establishments located outside of Iowa, with a remittance of the purchase price, plus transportation charges, specifying the means of transportation; the order is accepted or refused at the mail order establishment; if accepted, the order is filled by direct shipment to the purchaser through the United States Mail, or some common carrier specified by the purchaser.

"It was stipulated for the purposes of this case that plaintiff is obligated to collect and has collected and paid the tax imposed upon all sales made by it to residents of Iowa classified as Types I and II, but that as to Type III, mail order sales, it failed and refused to collect the use tax imposed by the use tax act. (Record, 133; 292 N. W. Reporter at 131)

"The only activities of plaintiff involved herein are the sales made pursuant to its mail order business. As to all other activities, for the purposes of this case, plaintiff concedes that the tax must be paid and it has been collected and paid. The mail order sales, however, do not constitute activities within the State of Iowa, nor do such sales constitute doing business within the state. The sales are consummated outside the State of Iowa in each instance. They are separate and distinct from plaintiff's activities in Iowa. The statute here challenged seeks to impose upon plaintiff the obligation that it 'shall at the time of making such sales, whether within or without the state, collect the tax imposed by this chapter from the purchaser'. The

sales are made outside of Iowa and the statute requires plaintiff to collect the tax at the time the sales are made." (Record, 142-143; 292 N. W. Reporter at 135)

The following facts appear upon the face of the petition for a writ of certiorari:

"Sears, Roebuck and Company and Montgomery Ward and Company are non-resident corporations licensed to do business in the State of Iowa. Pursuant to such licenses they have established and are now conducting various retail stores in Iowa. In addition to the businesses conducted in Iowa, these corporations each conduct a mail order business through mail order stores or establishments located outside of Iowa. From time to time mail order catalogs are sent to prospective customers in Iowa and the Iowa customers send orders by mail to such mail order stores located outside of Iowa and the orders are there filled and the merchandise shipped to the purchasers in Iowa.

"The Iowa Use Tax Act provides that every retailer maintaining a place of business in the State and making sales of tangible personal property for use in the State shall at the time of the making of the sale, whether within or without the State, collect 2% use tax from the purchaser. Other provisions of the Act provide that the tax shall constitute a debt owed by the retailer to the State and further that whenever the retailer maintaining a place of business in the State is a corporation authorized to do business in Iowa and fails to comply with the provisions of the Iowa Use Tax Act, then the retailer's license and the permit authorizing the corporation to do business in the State of Iowa may be revoked.

"Sears, Roebuck and Company and Montgomery Ward and Company, hereafter called the corporations, have not collected or paid a use tax on such mail order sales to the Iowa residents. Louis E. Roddewig, D. L. Murrow and C. Frank Green, members of the Iowa State Board of Assess-

ment and Review, hereafter called the Board, adopted a resolution threatening to revoke the corporations' retailers licenses and permits to do business in Iowa for failure to collect and pay the use tax on mail order sales of tangible personal property to the residents of Iowa." (Petition for Writ of Certiorari, pp. 2-3)

THE STATUTES INVOLVED.

Certain provisions of Chapter 329.4, Code of Iowa, 1939, commonly known as the Iowa Use Tax Act, as applied to respondent's mail order business, are here involved. These provisions are reflected in Section 6943.109, which provides that retailers maintaining a place of business in the state and making sales of tangible personal property for use in the state "shall at the time of making such sales, *whether within or without the state*, collect the tax imposed * * *". (Italics ours)

Section 6943.112 provides that "the tax herein required to be collected by any retailer pursuant to Section 6943.109 * * * shall constitute a debt owed by the retailer to this state".

Section 6943.122 provides that whenever the retailer maintaining a place of business in Iowa is a foreign corporation authorized to do business in Iowa, and said corporation fails to comply with the provisions of the Act, then the corporation's permit to do business in Iowa as a foreign corporation and its retail licenses may be revoked.

REASONS WHY THE WRIT SHOULD NOT ISSUE.

I.

Under the facts disclosed upon the face of the petition for writ of certiorari and the opinion of the Supreme Court of Iowa sought to be reviewed, it plainly appears that the threatened action of the petitioners constituted a regulation

of respondent's activities outside the State of Iowa and that therefore the decision of that court is in accord with applicable decisions of this court and this court should exercise its discretion and deny the petition for the writ.

Rule 38, par. 5, subdivision a.

Connecticut General Life Ins. Co. v. Johnson, 303 U. S. 77; 82 L. ed. 673.

New York Life Ins. Co. v. Dodge, 246 U. S. 357; 62 L. ed. 772.

New York Life Ins. Co. v. Head, 234 U. S. 149; 58 L. ed. 1259.

Home Insurance Co. v. Dick, 281 U. S. 397.

Hartford Accident & Ind. Co. v. Delta & P. Land Co., 292 U. S. 143; 78 L. ed. 1178.

Pennoyer v. Neff, 95 U. S. 714; 24 L. ed. 565.

St. Louis Cotton Compress Co. v. Arkansas, 260 U. S. 346; 67 L. ed. 297.

Baldwin v. Seelig, 294 U. S. 511; 79 L. ed. 1032.

Fidelity & Deposit Co. v. Tafoya, 270 U. S. 426; 70 L. ed. 664.

New York, Lake Erie & Western Ry. v. Pennsylvania, 153 U. S. 628; 38 L. ed. 847.

II.

Since petitioners claim that under Section 6943.109, Code of Iowa 1939, respondent was required to make collection of the tax involved at the time of making its mail order sales outside the State of Iowa, and since by Section 6943.-112, Code of Iowa 1939, the tax required to be collected by any retailer pursuant to Section 6943.109 is declared to constitute a debt owing by the retailer to the State of Iowa, in legal effect, under the facts appearing on the face of the petition for the writ of certiorari and the opinion of the court below, the threatened enforcement of these provisions constitutes the imposition of a tax upon respondent's gross receipts upon its mail order business consummated without the State of Iowa; and the decision of the Iowa Supreme Court holding that the due process clause

of the Fourteenth Amendment denies to that state the power to tax respondent's activities outside the state, is in accord with the applicable decisions of this court and this court should exercise its discretion and deny said petition.

James v. Dravo Contracting Co., 302 U. S. 134; 82 L. ed. 155.
Connecticut General Life Ins. Co. v. Johnson, 303 U. S. 77; 82 L. ed. 672.
Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194; 50 L. ed. 150.

Where an impost is levied by authority of a government upon its citizens or subjects for a governmental purpose, it is not a debt but is a tax.

Bailies v. City of Des Moines, 127 Iowa 124, at 126.
Liberty Mutual Ins. Co. v. Johnson Shipyards Co., 6 Fed. (2d) 752.

III.

Under the facts appearing upon the face of the petition for the writ of certiorari and the opinion of the Supreme Court of Iowa sought to be reviewed, the consummation of the threatened action of petitioners would constitute a regulation of and substantial burden and impairment of the free flow of interstate commerce, contrary to the provisions of Section 8 of Article I of the Constitution of the United States, and therefore the decision of the Supreme Court of Iowa is in accord with the applicable decisions of this court and this court should therefore exercise its discretion and deny said writ.

Heyman v. Hayes, 236 U. S. 178; 59 L. ed. 527.
Montgomery, Ward & Co. v. Fry (Michigan), 269 N. W. 166.
Puget Sound Stevedoring Co. v. Tax Commissioner, 302 U. S. 90; 82 L. ed. 68.
Fisher's Blend Station v. Tax Commission, 297 U. S. 650; 80 L. ed. 956.

Crew Levick v. Pennsylvania, 245 U. S. 292; 62 L. ed. 295.
Adams Mfg. Co. v. Storen, 304 U. S. 307; 82 L. ed. 1365.

ARGUMENT.

Review on writ of certiorari is not a matter of right but of sound judicial discretion, and will be granted only where there are special and important reasons therefor; and, where the decision sought to be reviewed is one of a state court, even though of a federal question of substance, it is only if such decision is probably not in accord with the applicable decisions of this court that certiorari will be granted. *United States Supreme Court Rules*, Rule 38, par. 5, subdivision a.

Conversely, even though a federal question of substance has been decided, if upon the undisputed facts it appears that a decision of the state court sought to be reviewed, is in accord with the applicable decisions of this court, then, we submit, this court should exercise its sound judicial discretion and deny the writ.

I.

The holding of the Iowa Supreme Court sought to be reviewed, that the Iowa Use Tax Act as construed and administered by petitioners constituted a regulation of the activities of respondent outside the state and was therefore void as violative of Section 1 of the Fourteenth Amendment to the Constitution of the United States, is in accord with the applicable decisions of this court.

We have heretofore stated the facts shown by the petition for the writ of certiorari and the opinion of the Supreme Court of Iowa which is referred to in the petition for the writ. Under these undisputed facts it appears that the only trans-

actions involved in this case are what are referred to as mail order sales consummated by respondent at its mail order establishments, each of which is located outside the State of Iowa. These sales are the result of the circulation of catalogs by respondent through the United States mail from one or the other of its mail order establishments to individuals resident within the State of Iowa, and are initiated by an order made out by a resident of Iowa and forwarded by mail to respondent's mail order establishment outside the state together with remittance covering the purchase and the cost of and specifying the means of transportation. The transaction is consummated by the direct shipment from respondent's mail order houses located without the State of Iowa to such customer within the State of Iowa, by mail or other common carrier service, of the goods so ordered.

Under these facts the Iowa Supreme Court held:

> "The only activities of plaintiff involved herein are the sales made pursuant to its mail order business. As to all other activities, for the purposes of this case, plaintiff concedes that the tax must be paid and it has been collected and paid. The mail order sales, however, do not constitute activities within the State of Iowa, nor do such sales constitute doing business within the State. The sales are consummated outside the State of Iowa in each instance. They are separate and distinct from plaintiff's activities in Iowa. The statute here challenged seeks to impose upon plaintiff the obligation that it 'shall at the time of making such sales, whether within or without the state, collect the tax imposed by this chapter from the purchaser.' The sales are made outside of Iowa and the statute requires plaintiff to collect the tax at the time the sales are made. It clearly seeks to regulate activities of plaintiff outside the state. Under the provisions of Section 6943.122, defendants seek to cancel plaintiff's license as a retailer in this state and its permit to do business here as a foreign corporation for failure to pay a debt which constitutes a regulation of its activities outside

of Iowa. Under repeated pronouncements of the Supreme Court of the United States, hereinbefore reviewed and quoted from, the State of Iowa has no such right." (Record, 143, 144; 292 N. W. at 135)

This conclusion, we submit, is entirely in accord with the controlling applicable decisions of this court.

In *Connecticut General Life Ins. Co. v. Johnson*, 303 U. S. 77, 82 L. ed. 673, the Supreme Court, in an opinion rendered January 31, 1938 and written by Mr. Justice Stone, had under consideration the validity of a tax laid by the State of California on the receipt by appellant in Connecticut of insurance premiums during the years 1930 and 1931 upon reinsurance contracts. The contracts were entered into with insurance companies which were doing business in the State of California and which companies had effected life insurance contracts on residents of California. In holding that such tax was invalid as a violation of the limitations prescribed by the Fourteenth Amendment to the Federal Constitution, the court said:

> "As a matter of convenience and certainty, and to secure a practically just operation of the constitutional prohibition, we look to the state power to control the objects of the tax as marking the boundaries of the power to lay it. Hence, it is that a state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere. * * * It follows that such a tax, otherwise unconstitutional, is not converted into a valid exaction merely because the corporation enjoys outside the state economic benefits from transactions within it, which the state might but does not tax, or because the state might tax the transactions which the corporation carries on outside the state if it were induced to carry them on within."

In *St. Louis Cotton Compress Co. v. Arkansas*, 260 U. S. 346, 67 L. ed. 297, the court, speaking through Justice Holmes, said:

> "It is true that the state may regulate the activities of foreign corporations within the state, but it cannot regulate or interfere with what they do outside."

These decisions of this court are merely a restatement of the long-settled rule that the sovereign powers of a state are limited to its territorial boundaries.

In *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565, this court said:

> "The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory. Story, Confl. L., ch. 2; Wheat. Int. L., pt. 2, ch. 2. The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions."

Nor may the power of the state to regulate activities performed without the state be enlarged because one of the parties to such activities is a citizen of such state.

> *Hartford Accident & Ind. Co. v. Delta & P. Land Co.* 292 U. S. 143, 146; 78 L. ed. 1178.

Nor is the power of the state to so regulate such activities performed outside the state enlarged merely because such activities involve contracts relating to property within the state.

> *Fidelity & Deposit Co. v. Tafoya*, 270 U. S. 426; 70 L. ed. 664.

See also:

New York Life Ins. Co. v. Dodge, 246 U. S. 357, 375; 62 L. ed. 772.

New York Life Ins. Co. v. Head, 234 U. S. 149, 164; 58 L. ed. 1259.

Home Ins. Co. v. Dick, 281 U. S. 397, 407; 74 L. ed. 926.

James v. Dravo Contracting Co., 302 U. S. 134, 139; 82 L. ed. 155.

Baldwin v. Seelig, 294 U. S. 511, 521; 79 L. ed. 1032.

New York, Lake Erie & Western Ry. Co. v. Pennsylvania, 153 U. S. 628; 38 L. ed. 847.

And the constitutional limitation upon the power of the state to regulate activities outside its borders may not be avoided under the guise of a license or otherwise.

In *New York Life Ins. Co. v. Head*, 234 U. S. 149, 164; 58 L. ed. 1259, the court, speaking by Mr. Justice White, said:

> "It is true it has been held that, in view of the power of a state over insurance, it might, as a condition of a license given to a foreign insurance company to do business within its borders, impose a condition as to business within the state, which otherwise, but for the complete power to exclude, would be held repugnant to the Constitution. In other words, that a company having otherwise no right whatever, for any purpose, to go in without a license, would not be heard, after accepting the same, to complain of exactions upon which the license was conditioned as unconstitutional, because of its voluntary submission to the same. But even if it be put out of view that this doctrine has been either expressly or by necessary implication overruled, or at all events, so restricted as to deprive it of all application to this case (see *Harrison v. St. Louis & S. F. R. Co.*, 232 U. S. 318, 332, 34 S. Ct. 333, 58 L. Ed. [621, 626] [L. R. A. 1915F, 1187], and authorities there cited), it here can have no possible application since such doctrine, at best, but recognized the power of a state, under the circumstances stated, to impose conditions upon the right to do the business embraced by the license, and therefore gives no support to the contention here presented, which is that a state, by a license, may acquire the right to exert an authority be-

yond its borders which it cannot exercise consistently with the Constitution. *But the Constitution and its limitations are the safeguards of all the states, preventing any and all of them, under the guise of license or otherwise, from exercising powers not possessed.*" (Italics ours)

Nor is the power of the state to regulate activities so performed without its borders by a foreign corporation qualified to do business in the state enlarged because the state might tax the transactions which the corporation carries on outside the state if it were induced to carry them on within.

In *Connecticut General Life Ins. Co. v. Johnson, supra,* it is said:

> "It follows that such a tax, otherwise unconstitutional, is not converted into a valid exaction merely because the corporation enjoys outside the state economic benefits from transactions within it, which the state might but does not tax, or because the state might tax the transactions which the corporation carries on outside the state if it were induced to carry them on within."

It appears from the undisputed facts shown by the petition for the writ of certiorari and the opinion of the court below whose decision is sought to be reviewed, that while respondent has qualified as a foreign corporation in the State of Iowa and maintains retail mercantile establishments there, all activities with which such retail mercantile establishments have any connection whatsoever have been by respondent subjected to said act and the tax therein prescribed has been paid.

Upon the direct shipment of goods pursuant to a mail order from one of respondent's mail order establishments located without the State of Iowa to a resident of the State of Iowa by mail or other common carrier service, the respondent loses all dominion and control over such goods,

and, under the undisputed facts shown by the petition for the writ and the opinion of the Supreme Court of Iowa whose decision is sought to be reviewed, does not thereafter perform any activity within the State of Iowa with respect thereto.

Under such undisputed facts, then, we submit the decision of the Iowa Supreme Court, that the Iowa Use Tax Act as construed and administered by the petitioners and as applied to the mail order sales of respondent constitutes the regulation of activities of respondent outside the State of Iowa and is therefore void, is in accordance with the foregoing controlling and applicable decisions of this court and therefore this court should, we submit, exercise its sound judicial discretion and deny the writ.

Nor is this conclusion contrary to the following cases, cited as supporting the petition for a writ of certiorari, for the reason that in each of such cases the non-resident shipper either made physical delivery of the property by its agent in the state of the residence of the purchaser or performed some other activity therein with respect thereto, and the laws of which contained use tax collection provisions similar to those involved in this case.

In *Felt & Terrant Mfg. Co. v. Gallagher*, 306 U. S. 62, 83 L. ed. 488, in holding the collection provisions of the California use tax as valid and applicable to the non-resident shipper under the facts in that particular case, the court said:

> "Appellant, an Illinois corporation, is engaged in manufacturing and selling comptometers in that state and delivering these to purchasers in various parts of the Union."

The fact is thus brought out that the appellant made deliveries of the comptometers it sold to purchasers located in various states. Indeed it appears from the decision of

the Supreme Court in that case as well as the trial court in *Felt & Tarrant Mfg. Co. v. Corbett*, 23 Fed. Sup. 186, that the company maintained agents and offices in the State of California and that such agents made deliveries of the merchandise sold to customers resident in California after such merchandise had been shipped from Illinois to such agents.

It seems clear that delivery of the comptometers was considered by the court as an activity of the company in the State of California after the interstate commerce had ceased and the goods shipped had come to rest, and therefore subjected it to regulation by the state.

Likewise in *Monamotor Oil Co. v. Johnson*, 292 U. S. 86, 78 L. ed. 1141, the court sustained the jurisdiction of Iowa to require the seller to collect a use tax on an interstate shipment of gasoline into Iowa, but from the opinion of the court it appears that the seller's place of business in connection with such transactions was within the State of Iowa and that at least in many instances actual physical deliveries were made by it to its customers in Iowa. Thus again the decision of the court is based on a state of facts utterly different from those appearing here.

In the recent case of *McGoldrick v. Berwind-White Coal Mining Co.*, ... U. S. ..., 84 L. ed. Adv. Sheet 343, the court upheld the provisions of the New York City tax upon shipments of coal from without the state to residents of New York City as against the claim that such tax and the collection provisions incident thereto constituted an unconstitutional burden on interstate commerce, and said that the only relation of the tax to interstate commerce

> "arises from the fact that immediately preceding *transfer of possession to the purchaser within the state*, which is the taxable event regardless of the time and place of passing title, the merchandise has been transported in interstate commerce and brought to its journey's end. (P. 348 L. ed. Adv. Sheet)

> Here the tax is conditioned upon a local activity *delivery of goods within the state* upon their purchase for consumption. It is an activity which apart from its effect on the commerce, is subject to the state taxing power." (P. 354 L. ed. Adv. Sheet) (Italics ours)

Thus it appears that a local activity by the seller, such as delivery of the physical property to the purchaser within the confines of the taxing state, is a necessary prerequisite as a matter of fact to the justification of the exercise of either the taxing or regulatory powers of the state of the purchaser's residence, and, as we have pointed out, under the undisputed facts hereinbefore set forth, there was neither physical delivery of the goods by respondent as the seller nor any other local activity by it performed within the State of Iowa with respect to the transactions involved. The receipt of the orders with the purchase price and transportation charges including the designation of method of shipment by the purchaser at the mail order establishment of respondent without the state, the acceptance thereof there, the filling of such orders there, and the direct shipment of the goods covered by such orders to such customer from such mail order houses without the state, establishes that the respondent performed no local activity with respect to such transactions within the State of Iowa. Delivery through the United States mail or other common carrier of such direct shipments constituted delivery to such purchasers at the places of business of the mail order houses of repondent, all of which were without the state.

So, because of the differences in point of fact, the foregoing cases not only do not constitute controlling authority justifying the granting of the petition for the writ, but really constitute authority calling for the denial of the writ in the exercise of this court's sound discretion, for the cases just referred to indicate the furthest point to which this court has gone in sustaining state jurisdiction over a non-resident

seller for taxation or regulation in connection with interstate sales is where the seller makes delivery to the buyer or performs some other activity in connection with the particular transaction in the state asserting jurisdiction to so tax or regulate.

II.

The requirement of said act (Section 6943.100 Code of Iowa 1939) that respondent collect the tax at the time of making its mail order sales outside the State of Iowa and the provision that such taxes so required to be collected shall constitute a debt owing by the respondent to the State of Iowa (Section 6943.112 Iowa Code 1939), in legal effect imposes a tax upon the activities of respondent outside the state, and the decision of the Supreme Court of Iowa here sought to be reviewed that such exaction violates the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, is in accord with the applicable decisions of this court, and this court should exercise its discretion and deny said petition.

An examination of Chapter 329.4, the Iowa Use Tax Act, which is made an exhibit to the argument in support of the petition for the writ of certiorari, will show that the tax therein provided is for general governmental purposes.

Where an impost is levied by authority of a government upon its citizens or subjects for a governmental purpose, it is not a debt but is a tax.

In *Bailies v. City of Des Moines*, 127 Iowa 124 at 126, the court, in considering this question, said:

> "The general tenor of the authorities is to the effect that a tax in its essential characteristics is not a debt, but an impost levied by authority of government upon its citizens or subjects for the support of the state. It is not founded on contract or agreement, but operates *in invitum*. Whereas a debt is a sum of money

due by certain and express agreement, and originates in or is founded upon contracts express or implied. In *Meriwether v. Garrett*, 102 U. S. 472, (26 L. ed. 197), it is said: 'A tax is a charge imposed by the Legislature for the purpose of revenue. It is not founded upon contract, and does not establish the relation of debtor and creditor. It is an enforced proportional contribution levied by authority of the State.' See, also, the long collection of cases in volume 2, Words and Phrases, page 1883."

In *Liberty Mutual Ins. Co. v. Johnson Shipyards Co.*, 6 F. (2d) 752, it was held:

"A 'debt' is a sum of money due on contract, express or implied, or one which is evidenced by a judgment; and 'taxes' are not debts but imposts levied by government for its support or for some special purpose which the government has recognized, and are due to the government in its sovereign capacity, while debts are due to the government in its corporate capacity."

And where such tax is upon activities which were carried on without the territorial limits of the state, it has no jurisdiction to impose the same.

In *James v. Dravo Contracting Co.*, 302 U. S. 134, 82 L. ed. 155, the court had under consideration the validity of a statute of West Virginia imposing an annual privilege tax upon the business of contracting. The Contracting Company in that case had four contracts with the United States Government for the construction of locks and dams in the Kanawha River and locks in the Ohio River, a part of activities in connection with which were performed in the state of West Virginia but other parts of activities in connection with which were performed outside the state of West Virginia, and, in deciding the question whether the state had the territorial jurisdiction to impose the tax measured by the gross receipts of the Contracting Company un-

der such contracts, this court, speaking by Chief Justice Hughes, said:

> "As to Territorial Jurisdiction.—Unless the activities which are the subject of the tax were carried on within the territorial limits of West Virginia, the state had no jurisdiction to impose the tax. * * *
>
> A large part of respondent's work was performed at its plant at Pittsburgh. The stipulation of facts shows that respondent purchased outside the State of West Virginia materials used in the manufacture of the roller gates, lock gates, cranes, substructure racks and spur rims, structural steel, patters, hoisting mechanism and equipment, under each of its contracts, and fabricated the same at its Pittsburgh plant. The roller gates and the appurtenant equipment were preassembled at respondent's shops at Pittsburgh and there were inspected and tested by officers of the United States Government. The materials and equipment fabricated at Pittsburgh were there stored until time for delivery, and the appropriate units as prepared for shipment were then transported by respondent to the designated sites in West Virginia and there installed. * * *
>
> It is clear that West Virginia had no jurisdiction to lay a tax upon respondent with respect to this work done in Pennsylvania."

The due process clause of the Fourteenth Amendment to the Federal Constitution denies the State of Iowa the power to impose a tax upon respondent's gross receipts realized from the conduct of its mail order business at its establishments outside the State of Iowa. The Supreme Court in *Connecticut General Life Ins. Co. v. Johnson*, 303 U. S. 77, 82 L. ed. 673, speaking to this question, said:

> "But the limits of the state's legislative jurisdiction to tax, prescribed by the Fourteenth Amendment, are to be ascertained by reference to the incidence of the tax upon its objects rather than the ultimate thrust of the economic benefits and burdens of transactions

within the state. As a matter of convenience and certainty, and to secure a practically just operation of the constitutional prohibition, we look to the state power to control the objects of the tax as marking the boundaries of the power to lay it. Hence it is that a state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere. * * * It follows that such a tax, otherwise unconstitutional, is not converted into a valid exaction merely because the corporation enjoys outside the state economic benefits from transactions within it, which the state might but does not tax, or because the state might tax the transactions which the corporation carries on outside the state if it were induced to carry them on within."

The Supreme Court of Iowa in its opinion, in speaking to this question, said:

"Defendants contend that the tax is a tax upon the use of property in this state, is really a tax upon the purchaser and is not a tax upon the plaintiff at all. Perhaps from a subtle and technical standpoint this may be true, but, if true, it is unimportant. Section 6943.109 requires that the tax be collected when the sale is made. Under the facts herein, the property is then without the state. Section 6943.112 makes the amount of the tax a debt owed by plaintiff and Section 6943.122 provides that a failure to pay that debt shall constitute proper grounds for revoking plaintiff's permit to do business in this state. From any reasonable or practical standpoint, the amount of the tax being made a debt of plaintiff, the statute at least constitutes regulation of plaintiff's activities outside the state as a condition to it being granted a license to do business in the state. This cannot be done." (Record, 136; 292 N. W. 132)

We submit the decision of the Supreme Court of Iowa that the State of Iowa was without power to compel respondent to pay the amount of the tax so levied on account

of its mail order sales consummated entirely outside the borders of Iowa, is in accord with the foregoing applicable decisions of this court, and this court should exercise its sound judicial discretion and deny the petition for the writ.

III.

Under the undisputed facts appearing on the face of the petition for a writ of certiorari and the opinion of the Supreme Court of Iowa, whose decision is sought to be reviewed, the Iowa Use Tax Act as construed and administered by petitioners, constitutes a regulation of and substantial burden and impairment of the free flow of interstate commerce, contrary to the provisions of Section 8 of Article I of the Constitution of the United States; and the decision of the Supreme Court of Iowa, we submit, is in accord with the applicable decisions of this court and this court should exercise its discretion and deny said writ.

It appears from the petition for a writ of certiorari and the opinion of the Supreme Court of Iowa, whose decision is sought to be reviewed, that every single transaction resulting in a purchase from and sale at respondent's mail order houses located in the states of Illinois, Minnesota and Missouri to residents of the State of Iowa, is a transaction in interstate commerce. As we have pointed out, the inception of such transaction is the sending of an order by United States mail from Iowa to such other state, the remittance of the purchase price by United States mail from Iowa to such other state, the acceptance of such order in such other state, and the shipment of the tangible personal property either by United States mail or other public carrier across the state line into Iowa. Although the right of respondent to engage in such interstate business does not exist because of any authority from the state of Iowa, nevertheless, by Section 8 of said act, it is required *"at the time of making such sales"* to collect the tax imposed by the act.

The interstate character of the mail order business has been specifically recognized by this court.

Heyman v. Hayes, 298 U. S. 178; 59 L. ed. 527.

See also—

Montgomery, Ward & Co. v. Fry (Michigan), 289 N. W. 166.

As we have pointed out, it further so appears that respondent performed no activity and exercised no dominion or control over the subject of said mail order transactions after the same had reached the State of Iowa. In actual practical effect said Iowa Use Tax Act, as construed and administered by petitioners, imposes a tax upon respondent's mail order transactions so performed in interstate commerce measured by a percentage of the gross purchase price.

While sustaining the principle that delivery by the seller within a state immediately following interstate transportation, is an event or incident investing such state with jurisdiction for tax and regulatory purposes, this court, in *McGoldrick v. Berwind-White Coal Mining Co.*, ... U. S. ..., 84 L. ed. Adv. Sheet 343, reiterated but distinguished the proposition that a state tax upon receipts derived from interstate commerce is an infringement of the commerce clause, stating:

> "It is true that a state tax upon the operations of interstate commerce measured either by its volume or the gross receipts derived from it has been held to infringe the commerce clause, because the tax if sustained would exact tribute for the commerce carried on beyond the boundaries of the taxing state, and would leave each state through which the commerce passes free to subject it to a like burden not borne by intrastate commerce. See *Western Live Stock v. Bureau of Revenue, supra* (303 U. S. 255, 82 L. ed. 827, 58 S. Ct. 546, 115 ALR 944); *Gwin, White & Prince v. Henneford, supra* (305 U. S. 439, 83 L. ed. 276, 59 S. Ct. 325)."

In the case of *Gwin, White & Prince v. Henneford*, 305 U. S. 434, 439, 83 L. ed. 272, 276, the opinion states:

> "But it is enough for present purposes that under the commerce clause, in the absence of congressional action, state taxation, whatever its form, is precluded if it discriminates against interstate commerce or undertakes to lay a privilege tax measured by gross receipts derived from activities in such commerce which extend beyond the territorial limits of the taxing state. Such a tax, at least when not apportioned to the activities carried on within the state * * * burdens the commerce in the same manner and to the same extent as if the exaction were for the privilege of engaging in interstate commerce and would, if sustained, expose it to multiple tax burdens, each measured by the entire amount of the commerce, to which local commerce is not subject."

But it is firmly established by controlling decisions of this court that under facts such as here disclosed the State of Iowa is without power to impose such a burden or to impair or regulate the free flow of such interstate commerce.

In *Puget Sound Stevedoring Co. v. Tax Commissioner*, 302 U. S. 90, 82 L. ed. 68, the court had under consideration a statute of the State of Washington which imposed a tax for the privilege of engaging in business activities within the state at the rate of ½ of 1% of the gross income from such business. The Puget Sound Stevedoring Company entered into a contract for the loading and discharging of vessels which were engaged in interstate and foreign commerce, and the court held that the performance of such work by a stevedore was as indispensable an agency of commerce as a ship-owner or master, and therefore that such work constituted interstate commerce. In holding that the Washington statute contravened the provisions of Section 8 of Article I of the Constitution of the United States, the court, speaking by Mr. Justice Cardozo, said:

"The business of loading and unloading being interstate or foreign commerce, the state of Washington is not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts. Decisions to that effect are many and controlling. *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 341, 342, 30 L. ed. 1200, 1203, 1204, 7 S. Ct. 1118, I Inters. Com. Rep. 308; *Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 8 S. Ct. 1380, 2 Inters. Com. Rep. 134; *Galveston H. & S. A. R. Co. v. Texas*, 210 U. S. 217, 52 L. ed. 1031, 28 S. Ct. 638; *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, 62 L. ed. 295, 38 S. Ct. 126; *Matson Nav. Co. v. State Bd. of Equalization*, 297 U. S. 441, 444, 80 L. ed. 791, 794, 56 S. Ct. 553; *Fisher's Blend Station v. Tax Commission*, 297 U. S. 650, 655, 80 L. ed. 956, 959, 56 S. Ct. 608."

In *Fisher's Blend Station v. Tax Commission*, 297 U. S. 650, 80 L. ed. 956, the court had under consideration a statute of the State of Washington which imposed an occupation tax measured by gross receipts from a radio broadcasting station, the broadcasting waves of which were projected across state lines, and in an opinion by Mr. Justice Stone the court held:

"As appellant's income is derived from interstate commerce, the tax, measured by appellant's gross income, is of a type which has long been held to be an unconstitutional burden on interstate commerce. *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 7 S. Ct. 1118, I Inters. Com. Rep. 308; *Leloup v. Mobile*, 127 U. S. 640, 32 L. ed. 311, 8 S. Ct. 1380, 2 Inters. Com. Rep. 134; *Galveston H. & S. A. R. Co. v. Texas*, 210 U. S. 217, 52 L. ed. 1031, 28 S. Ct. 638; *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, 62 L. ed. 295, 38 S. Ct. 126."

In *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, there was involved a state tax upon the business of selling goods in foreign commerce measured by gross receipts for goods so sold and shipped, and such tax was pronounced an im-

post upon exports and therefore without the power of the state to lay because of the provisions of Section 8 of Article I of the Constitution of the United States investing the Congress with exclusive power to regulate foreign commerce. In the course of the opinion, the court said:

> "Nor is it an occupation tax except as it is imposed upon the very carrying on of the business of exporting merchandise. It operates to lay a direct burden upon every transaction in commerce by withholding for the use of the State a part of every dollar received in such transactions."

In *Adams Mfg Co. v. Storen*, 304 U. S. 307, 82 L. ed. 1365, there was involved a statute of Indiana laying a gross receipts tax upon all sales of a manufacturing company located in that state. In an opinion by Mr. Justice Roberts, the court held that such tax constituted an unlawful burden upon interstate commerce and violated Article I, Section 8 of the Federal Constitution, and said:

> "We conclude that the tax is what it purports to be,—a tax upon gross receipts from commerce. Appellant's sales to customers in other states and abroad are interstate and foreign commerce. The Act, as construed, imposes a tax of one percent on every dollar received from these sales.
>
> The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids. We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by Article I, Section 8 of the Constitution. The opinion of the State Supreme

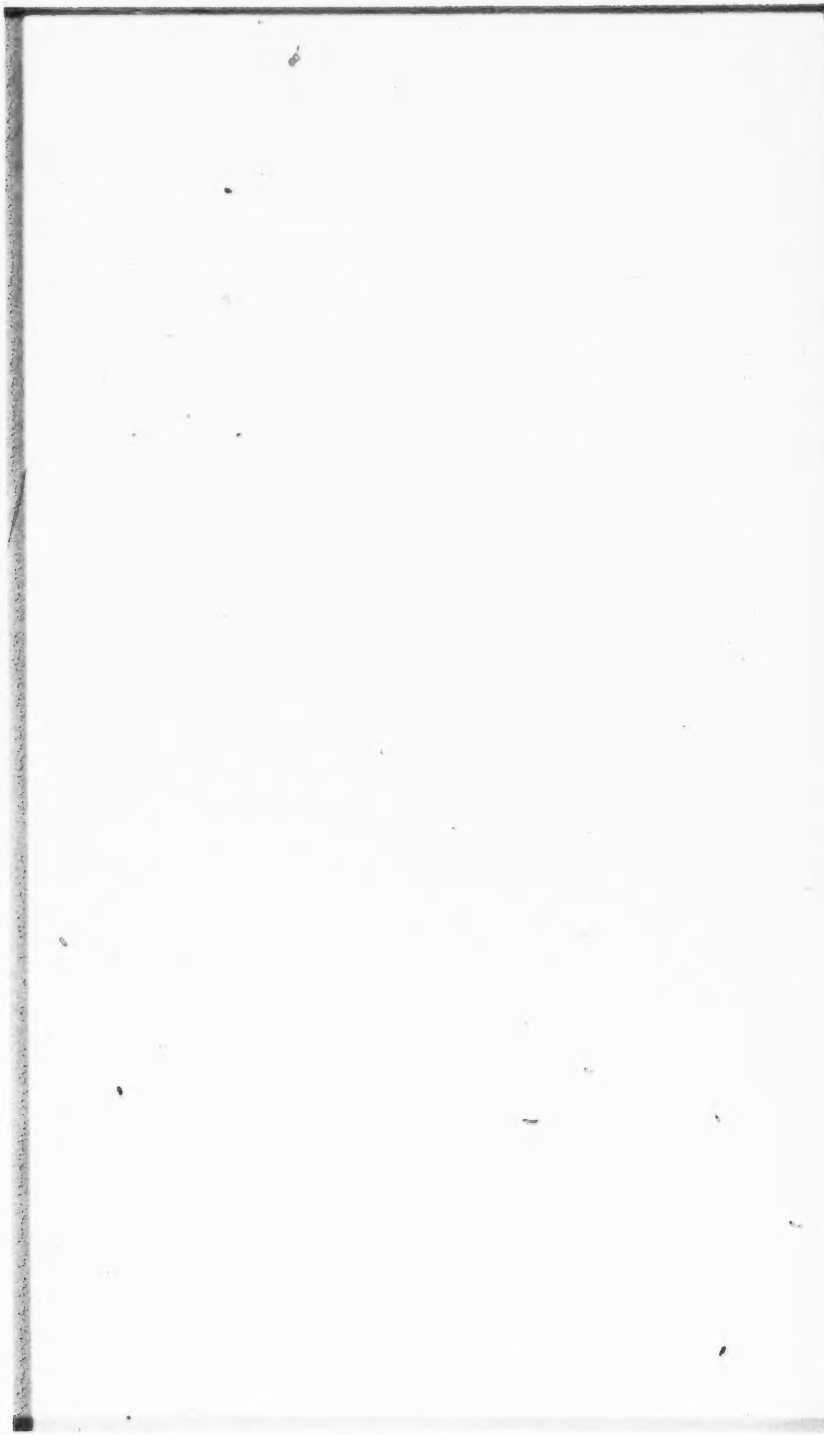
Court stresses the generality and nondiscriminatory character of the exaction but it is settled that this will not save the tax if it directly burdens interstate commerce."

The Supreme Court of Iowa referring to certain decisions relied upon by petitioners and making a special reference to the case of *McCarroll v. Dixie Greyhound Lines*, 60 S. Ct. 504, 506, 84 L. ed. 441 (Record 146-148), decided February 12, 1940, held that the State of Iowa was without power in the enactment of the Iowa Use Tax Act to impose a tax upon the interstate transactions represented by respondent's mail order sales consummated at its mail order establishments outside the State of Iowa, since such would constitute a burden upon and regulation and impairment of the free flow of interstate commerce.

In the light of undisputed facts heretofore set forth, we submit that the Supreme Court of Iowa properly held the provisions of the Iowa Use Tax Act as applied to the transactions involved in this case, invalid inasmuch as such provisions, in accordance with the applicable decisions of this court, are in effect a regulation of, and burden upon interstate commerce, and that therefore this court should exercise its sound judicial discretion and deny the writ.

We respectfully submit that for the reasons above set forth, the writ of certiorari should be denied.

CHARLES LEDERER,
JOSEPH G. GAMBLE,
RALPH L. READ,
Attorneys for Sears, Roebuck and Co., Respondent in No. 255.



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Supreme Court of the United States

October Term, 1940.

No. 256

LOUIS E. RODDEWIG, AS CHAIRMAN OF THE IOWA STATE BOARD OF ASSESSMENT AND REVIEW, AND INDIVIDUALLY; D. L. MURROW AND C. FRANK GREEN, AS MEMBERS OF THE IOWA STATE BOARD OF ASSESSMENT AND REVIEW, AND INDIVIDUALLY,

Petitioners,

vs.

MONTGOMERY WARD & CO., INCORPORATED,

Respondent.

RESISTANCE TO PETITION FOR WRIT OF CERTIORARI

STUART S. BALL,
Attorney for Respondent.

Of Counsel:

J. L. PARRISH, JR.,
MAXWELL A. O'BRIEN,
HAROLD W. BANCROFT.

Midwest Law Printing Co.,
Delaware 6669,
361 W. Superior St.,
Chicago

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LOUIS E. RODDEWIG, AS CHAIRMAN OF THE IOWA STATE BOARD OF ASSESSMENT AND REVIEW, AND INDIVIDUALLY; D. L. MURROW AND C. FRANK GREEN, AS MEMBERS OF THE IOWA STATE BOARD OF ASSESSMENT AND REVIEW, AND INDIVIDUALLY,

Petitioners,

vs.

MONTGOMERY WARD & CO., INCORPORATED,

Respondent.

RESISTANCE TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Opinions Below

The opinion of the Iowa Supreme Court in this case (No. 256) is reported in 292 N. W. 142. The opinion in the *Sears, Roebuck* Case (No. 255) is reported in 292 N. W. 130.

Statement of the Case

The Petition for Writs of Certiorari filed in these cases relates to two separate suits for injunction tried at different times, argued on separate briefs, and decided on independent records. The Petition does not distinguish between the two cases.

Montgomery Ward & Co., Incorporated, respondent in this case, submits that the grounds advanced in the Petition are not sufficient to require review of the judgment of the Supreme Court of Iowa as to it. The position taken by this respondent differs in some respects from that taken by the respondent in No. 255. The difference arises in part from differences in the record. We respectfully submit that the considerations herein advanced, considered independently, show that this case is not one as to which this Court would desire to exercise its discretionary power of review.

The petitioners' "Summary Statement" of the facts omits certain facts very important to a proper understanding of the issues presented in this case.

The Iowa Use Tax Act requires retailers maintaining a place of business in Iowa and making sales of tangible personal property for use in the state to collect the tax imposed "at the time of making such sales, *whether within or without the State.*" (Section 6943-109, Code of Iowa, 1939—italics added.) By its express wording, the statute thus compels the performance of an act outside the state.

This respondent makes two types of sales which are affected by this requirement of tax collection:

1. sales made to Iowa customers by mail from mail order houses located outside the state of Iowa;
2. sales made to Iowa customers by retail stores located outside of Iowa, some of which are near the borders of Iowa.

The Petition says nothing about this second type of sale, although eight of the nine justices of the Iowa Court agreed that the collection provisions of the Iowa Use Tax Act were unconstitutional as to them. (See pp. 153 and 154, record in No. 256.)

Furthermore, the Petition omits to point out that this respondent collected and returned the Iowa Use Tax with respect to "sales made by order offices" in the state of Iowa as well as with respect to mail order sales "with which their stores located in the State of Iowa had had some connection" (p. 63 of the record in No. 256). The respondents sought an injunction only against being compelled to do more. The Petition thus fails to point out that the questions in this case arise as to acts of the respondent which are totally unconnected with any acts performed within the State of Iowa.

The position taken by the Petitioners, when stated succinctly, is this:

1. The Supreme Court of Iowa improperly held that the collection and payment provisions of the Iowa Use Tax Law operated extra-territorially and for this reason fell within the prohibitions of the Fourteenth Amendment to the Constitution; such a holding conflicts with the decisions of this Court in *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U. S. 62, and *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86.

2. The Supreme Court of Iowa improperly held that the collection and payment provisions of the Iowa Use Tax Law burdened interstate commerce in such a manner as to offend against section 8 of Article I of the Constitution of the United States; such a holding conflicts with a number of decisions of this Court, including *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33.

This resistance is designed to show:

1. That the first contention is unsound because the principle of constitutional law invoked by the Iowa Court is unchallenged, the statute admittedly offends against this principle on its face, its application to the facts of this particular case would obviously amount to a projection of Iowa's regulatory powers into other states, and the facts are entirely different from those involved in the *Felt & Tarrant* and *Monamotor* cases.

2. That the second contention is unsound because the Supreme Court of Iowa did not find it necessary to determine whether the statute was invalid under the commerce clause.

We shall, for the purpose of clarity, discuss the second contention first.

I. The Validity Of The Collection And Payment Provisions Of The Iowa Use Tax Act Under Section 8 Of Article I Of The Constitution Of The United States Was Not Determined By The Supreme Court Of Iowa.

In the attempt of the petitioners to show some possible doubt as to the correctness of the Iowa Supreme Court's decision, the statement is made that this decision

> "held that the collection and payment provision of the Iowa Use Tax Law as applied to the corporations' mail order businesses constituted a violation of Section 8 of Article I of the Constitution of the United States." (Petition, p. 6)

This statement is entirely misleading. The question of burden on interstate commerce was not one upon which the Supreme Court of Iowa found it necessary to pass. The majority opinion simply held:

> "From any reasonable or practical standpoint, the amount of the tax being made a debt of plaintiff, the statute at least constitutes regulation of plaintiff's activities outside the state as a condition to it being granted a license to do business in the state. This cannot be done." (P. 136, record in No. 255)

This statement of the Court's conclusion is followed and fortified by quotations from nine decisions of this Court, none of which refer to the placing of a burden upon interstate commerce, and every one of which upheld the principle that a state cannot "project its legislation" into other states. *(Cf., Baldwin* v. *Seelig,* 294 U. S. 511, at p. 521.) Following this discussion, the Court restated the basis of its decision:

> "But it (the state of Iowa) has no power to regulate plaintiff's activities outside this state, nor has it the power to regulate such activities as a condition to plaintiff's right to continue to do business here." (P. 142 of the record in No. 255)

The prohibition against the enactment by state legislation of extraterritorial laws derives from the general nature of the Constitutional system and is reinforced by the due process clause of the Fourteenth Amendment. It does not arise in the commerce clause, and applies equally to regulation of extraterritorial activities which are not in, or connected with, interstate commerce, such as this respondent's retail sales in stores outside Iowa.

Following its discussion of these nine governing precedents, the Supreme Court of Iowa proceeded to analyze six cases cited by the attorney-general, pointing out that the six decisions, including *McGoldrick* v. *Berwind-White Coal Mining Co.,* 309 U. S. 33, "do not involve the question that confronts us." (P. 146, record in No. 255)

The opinion concludes with citations from *McCarroll v. Dixie Greyhound Lines*, 309 U. S. 176, the only case cited as a precedent which involved the commerce clause. As to it, the opinion says:

> "While the question presented in the case last quoted from is different from the question that now confronts us, it seems apparent that the decision there made was prompted by some of the principles of law which are recognized and applied in the precedents which we deem controlling here." (Pp. 147-148, record in No. 255)

This precedent was invoked solely as testimony of the current acceptance of the principles behind the nine cases originally cited.

Although the Supreme Court of Iowa might have based its decision upon a conflict between the Iowa Use Tax Act and Section 8 of Article I of the Constitution, the opinion thus shows that the Court did not do so. The Iowa Court clearly found it unnecessary to determine any issues under the commerce clause. While arguments based on the commerce clause might add further support to the Iowa Court's decision, they could not conceivably result in a reversal of that decision. Such arguments would be pertinent only if the decision below cannot be sustained on the reasoning advanced by the state court.

The decision of the Iowa Supreme Court does not call for review by this Court on any supposed ground of inconsistency with decisions interpreting the commerce clause. Therefore Point III of petitioners' Argument, including all the text from the middle of page 15 to the Summary, is totally irrelevant.

II. The Decision Of The Iowa Court As To The Extra-Territorial Effect Of The Collection And Payment Provisions Of The Iowa Use Tax Act Is Not Only Patently Correct On The Basis Of The Record In This Case, But Involves No Possible Conflict With The *Felt & Tarrant* And *Monamotor* Cases.

The supposed conflict between the decision of the Iowa Court in this case and the two decisions of this Court cited by the Petitioners disappears quickly when the issues and the facts are stated simply. First, however, a brief demonstration of the patent soundness of the opinion below may help to define the problem presented by the record.

A. The Decision Below Was the Only Logical One Which Could Be Made Upon the Facts Presented to the Court.

Upon the record made by this respondent, we submit that the decision of the Supreme Court of Iowa was so obviously correct as to justify no formal review by this Court.

1. The Petition raises no doubts as to the principle of law followed by the Iowa Supreme Court, but questions only the application of the principle to the facts of the present case.

The Petition emphasizes the monetary results of the decision of the Iowa Supreme Court to the State of Iowa as showing the supposed importance of the case. The Petition does not, nor could it, pretend that any novel or questionable principle of constitutional law was involved.

The constitutional principle considered by the Iowa Supreme Court to be controlling was the principle that a

state may not, under any disguise, seek to regulate the conduct either of business or of personal affairs outside the boundaries which mark the limits of state power. To do so would infringe upon the independent sovereignty of its fellow members in the Federal Union. This principle was restated recently with reference to the taxing power:

> "Hence it is that a state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere."
>
> *Conn. Gen. Life Ins. Co.* v. *Johnson*, 303 U. S. 77, at p. 80.

This statement of the principle was quoted in the opinion of the majority of the Iowa Supreme Court. The main dissent said with respect to it:

> "We have no quarrel with the *Johnson* case." (P. 155, record in No. 255)

The position of the petitioners before this Court is the same, for under Point II of their Brief in support of their Petition—the only portion of the Brief relating to the real issue—they say:

> "We do not feel that anything can be added by way of argument to the statements made by Chief Justice Hamilton in the dissenting opinion in the *Sears, Roebuck* case." (Petition, p. 14)

The Petition simply presents to this Court the question whether an unchallenged principle of constitutional law was correctly applied to the particular facts which the case presents.

2. The collection and payment provisions of the Iowa Use Tax Act are admittedly invalid when literally applied and the petition in effect asks this Court to rewrite the statute.

The Iowa Use Tax Act compels every retailer doing business in Iowa to collect the use tax in connection with every sale made by it "at the time of making such sales, whether within or without the state". (Section 6943-109, Code of Iowa, 1939) Thus the duty of collection must be performed *at the time* a sale is made to an Iowa customer, even if the sale is made *without the state.*

No language could more clearly impose the duty of performing an act outside the state. The collection and payment provisions of the Iowa Use Tax Act are an open and undisguised attempt by the legislature of Iowa to project the power of the State of Iowa beyond its boundaries.

The Supreme Court of Iowa properly interpreted these provisions of the Iowa Use Tax Act as applying to such sales as those made by the respondent to Iowa customers at out-of-the-state retail stores. Eight of the nine justices of the Iowa Court agreed that the statute is clearly unconstitutional as applied to such sales. *The Petition does not raise any question as to the correctness of the decision below holding the statute unconstitutional when so applied.* The Petitioners thus admit that the challenged statute is unconstitutional as written.

The challenged provisions of the statute are not on their face separable between their application to out-of-the-state retail store sales and to out-of-the-state mail order sales. Under normal rules of constitutional law, the challenged provisions would thus be void in their entirety. What the Petition does, in effect, is to ask this Court to rewrite the challenged sections of the statute to make

them apply only to some of the sales made by this respondent to Iowa customers. (Footnote 1)

3. **The Supreme Court of Iowa was clearly correct in holding that any statute directed against the type of sales covered by this respondent's petition for injunction would operate extraterritorially.**

Since, in effect, this Court must redraft the statute if the petitioners' request be granted, the issue is somewhat different than if associated with a legislative finding of fact directed to the specific situation before this Court. Here no legislative finding has been made that all mail order sales require uniform treatment, or that practical reasons of administration prevent the analysis of out-of-the-state mail orders to discover those as to which some related act is performed within Iowa as distinct from those which are wholly extraterritorial. The issue is simply whether the specific type of sales covered by the issues were in any way within the jurisdiction of Iowa.

The statute cannot be saved by speculations as to what the respondent *might* have done within the boundaries of Iowa as to its mail order sales; the question is whether it *did* anything within the state of Iowa as to the sales of the type specifically covered by its petition for an injunction.

The issues arose under an injunction sought against the threat of the petitioners to cancel the respondent's license to do business unless it collected the use tax with

---

Footnote 1: The right of this Court to do so exists, if at all, solely because of a broad separability clause added to the Use Tax Act by the legislature, but not reprinted in the Iowa Code:

"If any section * * * of this act or the application thereof to any person or set of circumstances is for any reason held to be unconstitutional or invalid, such decision shall not affect the validity of the remaining portions of this act, or its application to any other person or set of circumstances. * * *"

(Sec. 27, S. F. 317, Acts of the 47th Gen. Assembly of Iowa—italics added.)

reference to sales as to which it was not then collecting and reporting the tax. All fact situations arising from sales as to which the respondent had collected and reported the use tax were thus excluded from the issues.

The tax had been collected and reported by this respondent as to all mail order sales solicited through order offices within the state of Iowa or as to which retail stores within the state "had had some connection" (p. 63 of the record in No. 256). The issues of this case therefore cover only sales not solicited within Iowa and as to which the retail stores had nothing to do. We submit that such sales were patently and obviously outside the jurisdiction of Iowa.

This conclusion is strengthened by the following uncontradicted testimony:

> "No employee of the mail order house lives within the State of Iowa and there are no acts done within the State of Iowa in regard to any of the orders sent to the mail order house. The company has no means of collecting any amounts or sums, or any machinery presently set up for collecting any sums from Iowa customers by individuals within the State of Iowa. * * *" (Pp. 49-50, record in No. 256)

The facts actually shown by the record do not permit any claim that the Supreme Court of Iowa wrongfully applied to the facts before it the unchallenged principle of constitutional law upon which its decision was predicated. The petitioners were left free by the decision below to apply the collection provisions of the Use Tax Act to sales which were, as a matter of fact, within Iowa's jurisdiction. The decision below was thus on its face just and correct, and does not call for the discretionary exercise of this Court's power of review.

B. The Decision of the Iowa Supreme Court Did Not Conflict With Any Decision of This Court.

The Brief attached to the Petition asserts a conflict on the point of extraterritoriality with only two decisions of this Court:

Monamotor Oil Co. v. *Johnson*, 292 U. S. 86

Felt & Tarrant Mfg. Co. v. *Gallagher*, 306 U. S. 62

The asserted conflict is entirely absent. In neither case did the fact situation permit any claim of extraterritoriality. In fact, in neither case was any resort to the principle upon which the Iowa Supreme Court relied made by counsel.

The *Monamotor* case involved two types of transactions: first, shipments of gasoline purchased outside the state to the *Monamotor* company itself within the state and there sold by it; second, shipments from points in Oklahoma direct to customers of *Monamotor* in Iowa. The part of the decision of this Court in the *Monamotor* case with which the present case is supposed to conflict begins a few sentences before the end of page 94 of 292 U. S., fills nearly half of page 95, and ends with the following clause quoted by the dissenting opinion in the present case:

> "* * * and the requirement that the appellant as the shipper into Iowa shall, as agent of the state, report and pay the tax on the gasoline thus coming into the state for use by others on whom the tax falls imposes no unconstitutional burden either upon interstate commerce or upon the appellant."

This passage relates, as the opening sentence makes clear, to the shipments direct from Oklahoma to customers in Iowa. But these shipments were made to those customers "upon their orders taken in Iowa, and the gasoline to fill such orders was shipped direct from Oklahoma." (Pp.

78 and 79 of the Brief of Appellant in the *Monamotor* case before this Court)

The *Monamotor* case thus referred to sales comparable to those made by respondent's order offices in Iowa, as to which respondent has collected the use tax, and which are not in issue in the present case.

The *Felt & Tarrant* case similarly was concerned only with sales made upon orders solicited by agents of *Felt & Tarrant* within the boundaries of California, the state levying the Use Tax.

The total irrelevance of these two decisions to the facts of the present case needs no further illustration.

Furthermore, nothing in the opinion of this Court in either of these two cases relates to the issue presented by the present case. This Court obviously never intended to indulge in idle discussion of an issue not before it. The asserted conflict exists neither in the result nor the reasoning.

CONCLUSION.

This is not a case which calls for the exercise of this Court's discretionary power of review. The Supreme Court of Iowa adopted and applied a principle of constitutional law which is not challenged by the petitioners. The statute held invalid was admittedly so when literally applied. The fact situation presented to the Supreme Court of Iowa was obviously one where the State of Iowa had no jurisdiction. Neither the result nor the reasoning conflicts in any way with any decision of this Court. We submit that the Petition should be denied.

Respectfully submitted,

STUART S. BALL,
Attorney for Respondent.

Of Counsel:
J. L. PARRISH, JR.
MAXWELL A. O'BRIEN,
HAROLD W. BANCROFT.